No. 2228-ORG Title: State of Arizona, Complainant
v.
State of California, et al.

Docketed:
January 19, 1953

Entry	Date	Proceedings and Orders
	Jan 19 1953	Motion for leave to file and bill of complaint filed.
	Jul 19 1989	Motion of the State Parties to reopen decree to determine disputed boundry claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations filed.
	Aug 2 1989	Extension of time to file response filed by the Fort Mojave Tribe - Extension for all parties granted to and including September 1, 1989, on August 7, 1989.
	Sep 1 1989	Response of the Tribes to the Motion of the States Parties to reopen decree filed.
	Sep 1 1989	Response of the United States filed.
	Sep 13 1989	DISTRIBUTED: October 6, 1989. (Motion of state parties to reopen decree to determine disputed boundry claims).
	Oct 10 1989	The motion of the State parties to reopen the decree to determine disputed boundry claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations is granted. Marshall, J., OUT
	Nov 17 1989	It is ordered that Robert B. McKay, Esquire, of New York, New York, Professor Emeritus, New York University School of Law, be appointed Special Master in this case to reopen decree to determine disputed boundry claims with respect to to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations.
	Nov 24 1989	Oath of the Special Master recieved.
	Jul 23 1990	Status of Discovery Proceedings and notice of death of Special Master filed.
	Jul 25 1990	REDISTIBUTED: September 24, 1990.
	Oct 1 1990	REDISTRIBUTED: October 5, 1990.
	Oct 9 1990	REDISTRIBUTED: October 12, 1990.
	Oct 15 1990	REDISTRIBUTED: October 26, 1990.
	Oct 29 1990	REDISTRIBUTED: November 2, 1990.
	Nov 13 1990	It is ordered that Frank McGarr, Esquire, of Chicago, Illinois, be appointed Special Master in place of Robert B. McKay, deceased.
	Nov 19 1990	Oath of the Special Master recieved.
	Oct 8 1993	Memorandum Opinion, Report and Order No. 14 of the Special Master received.
	Oct 18 1993	ORDER: The memorandum opinion and order no. 14 of the Special Master is received and ordered filed. Exceptions to the opinion and order, with supporting briefs, may be filed by the parties within 45 days. Reply briefs, if any, may be filed by the parties within 30 days.
	Nov 12 1993	Joint motion of the parties to suspend briefing schedule filed. (also Memorandum opinion and order no. 15 by the Special Master issued November 10, 1993 (NP)).
	Nov 29 1993	ORDER: The joint motion of the parties to suspend the

3 pp

Entry	Date	Proceedings and Orders
		briefing schedule set by order of the Court October 18, 1993, is granted.
	Aug 11 1994	Motion of West Bank Homeowners Association for leave to intervene filed.
	Oct 3 1994	ORDER: The motion of West Bank Homeowners Association for leave to intervene is referred to the Special Master.
	Apr 3 1995	Special Master Report on motion of West Bank Homeowners'Association for leave to intervene received. (Special Master Memorandum and Opinion No. 17).
	Apr 5 1995	DISTRIBUTED. (April 21, 1995).
	Apr 24 1995	ORDER: The motion of West Bank Homeowner's Association for leave to intervene is denied.
	Oct 6 1995	Special Master Report on CO River Indian Tribes & United States Motion for Summary Judgment. (Special Master Memorandum Opinion and Order No. 18) received. (NP)
	Nov 13 1995	Reply Memorandum of the Colorado River Indian Tribes in support of Motion to Reconsider filed. (NP)
	Jan 30 1996	3 boxes containing original documents and exhibits received from Special Master.
	Jul 30 1999	Report and Recommendation of Special Master and 2 volume appendix received. (appendix not printed)
	Oct 4 1999	Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Reply briefs, if any, may be filed by the parties within 30 days.
	Oct 26 1999	Application (99A344) to extend the time to file a petition for a writ of certiorari from November 18, 1999 to January 14, 2000, submitted to Justice O'Connor.
	Oct 27 1999	Application (99A344) granted by Justice O'Connor extending the time to file until December 18, 1999.
	Nov 2 1999	Extension of time for all parties who wish to file exceptions to Report of Special Master extended to and including December 18, 1999.
	Dec 20 1999	Exception of the United States and brief in support filed.
	Dec 20 1999	Exception by State Parties and brief in support filed.
	Dec 20 1999	Motion of West Bank Homeowners Association for leave to file a brief as amicus curiae filed.
	Dec 20 1999	Exception of the Quechan Indian Tribe and brief in support filed.
	Jan 13 2000	Extension of time for all parties to file replies to exceptions to Report of Special Master extended to and including February 2, 2000.
	Jan 18 2000	Brief of California, et al. in opposition to motion of West Bank Homeowners Assn. for leave to file a brief as amicus curiae filed.
	Jan 19 2000	Reply of Colorado River Indian Tribes to proposed brief amicus curiae of West Bank Homeowners Assn. filed
	Feb 2 2000	State Parties reply to Exceptions of United States and

No. 2228-ORG

Entry	Date	Proceedings and Orders
		Quechan Indian Tribe filed.
	Feb 2 2000	DISTRIBUTED. February 18, 2000 (Page 35)
	Feb 2 2000	Reply of United States to Exceptions of State Parties filed (NP).
	Feb 18 2000	Motion of the West Bank Homeowners Association for leave to file a brief as amicus curiae is granted. The Exceptions to the Report of the Special Master are set for oral argument in due course.
	Feb 18 2000	ARGUMENT SET FOR April 25, 2000.
	Feb 28 2000	Motion of the United States for divided argument filed.
	Mar 9 2000	CIRCULATED.
	Mar 20 2000	Motion of Solicitor General for divided argument is granted.
	Apr 25 2000	ARGUED.

Office - Supreme Court, U.S.
FILED
NOV 10 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 8, Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants;

THE UNITED STATES OF AMERICA, STATE OF NEVADA, COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,

Intervenors;

STATE OF UTAH AND STATE OF NEW MEXICO,

Impleaded Defendants.

COMMENTS ON THE DECREE PROPOSED BY THE UNITED STATES AND REVISED DECREE PROPOSED BY THE STATE PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 8, Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, *et al.*,

COMMENTS ON THE DECREE PROPOSED BY THE UNITED STATES AND REVISED DECREE PROPOSED BY THE STATE PARTIES

INTRODUCTION

The State Parties[1] submit these comments in opposition to the proposed decree of the United States, joined in by the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma (Quechan) and Cocopah Indian Tribes, because portions of that decree would adjudicate certain issues

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[1]The State of Arizona, State of California, State of Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California.

which, with one exception,[2] were neither litigated by the parties, ruled upon by the Special Master, nor addressed by this Court's March 30, 1983 opinion.

The State Parties have reviewed the United States' comments on our proposed decree and continue to adhere to the form and substance of our proposed decree. However, we have modified Articles III(C) and (D) to reflect an agreement among the parties with respect to certain Fort Mojave Reservation lands (U.S. Memorandum, p. 3), broadened the definition of "boundary lands" in Article I(E) in light of the United States' comments, and renumbered several articles.[3] Our revised decree is set out as an appendix to these comments.

The State Parties note that there is agreement upon the amount of additional water which should be allocated to the Cocopah and Fort Mojave Indian Tribes as a result of the Court's decision. The points of difference arise out of three additional provisions contained in paragraphs (D), (E) and (H) of the United States' proposed decree.

Paragraphs (D) and (H) would limit any adjustment of the 1964 decreed reservation water allocations resulting from final boundary determinations to only upward adjustments and would preclude a diminution of those allocations in the event that it is finally determined that the reservation boundaries are smaller than those used as the basis of the 1964 allocations. Paragraph (D)(2) provides that unilateral administrative decisions by the Secretary of the Interior which remain unchallenged for more

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[2]See p. 9, n. 7 *infra*.

[3]Articles III(H), VI and VII have been changed to III(G), IV and V respectively.

than one year will constitute final determinations of boundaries for water allocation purposes.

Paragraph (E) would generally extend the subordination clause of the 1979 Supplemental Decree, by which the State Parties voluntarily conceded a paramount priority to the 1964 allocations to the Tribes, to any subsequent decree of this Court which adjudicates additional water rights for those Tribes. The United States specifically requests that the subordination language include the additional statutory allocation to the Cocopah Tribe, which the Court assigned a 1974 prior y date.

The referenced provisions are a blatant effort to obtain an unwarranted advantage for the Tribes from its unjustified attempt to relitigate, on a selective basis, the measure of the Tribes' previously adjudicated water rights. It is nothing more than a further display of the United States' overreaching which would distort the Court's March 30, 1983 opinion into the basis for a proposed no-lose proposition for the United States and the Tribes, and a no-win proposition for the State Parties with respect to any future final boundary determinations.

1. The "no reduction" issue

There is absolutely no basis for the contention by the United States that the amount of water allocated to the Tribes under the 1964 Decree should never be reduced even if it is "finally determined" that the boundaries on which that decree was based were erroneous. This Court's 1963 opinion rejected Special Master Rifkind's attempt to determine certain boundaries and left such determinations and consequent adjustment of water rights to future adjudication:

> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River

Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here." 373 U.S. 546, 601.

Moreover, the Court wrote that the 1964 Decree:

". . . shall be subject to *appropriate adjustment* by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined;" 376 U.S. 340, 345; emphasis added.

Now that the United States and the Tribes have reopened the question of proper boundaries, the State Parties must be allowed to assert all of their claims and defenses as to those boundaries. Fairness dictates that all parties' rights in any future litigation must be equal.

The United States asserts that allowing only an upward adjustment of water when the boundaries are finally determined does not require "strictly speaking . . . any ruling on the underlying Reservation boundaries." (U.S. Memorandum, page 6). This assertion is clearly fallacious. To bar a reduction in the Tribes' 1964 allocations conclusively presumes that the boundaries of the reservations are *at least* as expansive as those found by Special Master Rifkind. This is contrary to the Court's express rejection of those boundary determinations.

Having failed to persuade this Court that it should not permit the State Parties to challenge the expanded boundary proposals which are at the heart of the Tribes' claims for additional water rights, the United States now seeks to set wholly inappropriate, onesided ground rules for the final boundary determinations which this Court has mandated. The United States' "heads I win, tails you lose" proposal is alien to our system of justice and should be firmly rejected. As to its assertion that "it is far too late

in the day to go backwards and re-open what has been accepted as finally settled for two decades" (U.S. Memorandum, page 5), we suppose that this is equally true with respect to the Fort Yuma (Quechan) Reservation boundaries. Yet the United States did not hesitate to attempt to reopen that long accepted boundary in these proceedings. The United States has played fast and loose with the boundaries of the reservations involved here for too long. They have made them a moving target on which neither this Court nor any party can safely rely. Hence it will be beneficial to all concerned to have them finally determined in a judicial, adversary context. Should those determinations uncover some defects in the boundaries on which the 1964 decree was based requiring either an upward or downward adjustment of the 1964 allocations, that is what the law requires and the United States cannot be heard to complain, especially since it bears the responsibility for presenting accurate boundaries to this Court as the basis for its reserved water rights claims.

Nor is the United States' belated embrace of the "Pandora's Box" argument persuasive here. (U.S. Memorandum, page 6). Having rejected the United States' effort to lift the box lid just a trifle for the sole benefit of the Tribes, the Court must have contemplated an end to piecemeal boundary disputes and a wholesale resolution of any challenged reservation boundaries in an appropriate judicial forum.

2. The "one year limitation" issue

The second provision suggested by the United States in Paragraph (D)(2) of its proposed decree is also objectionable. The United States proposes that final administrative decisions which remain unchallenged by judicial proceedings for more than one year should constitute "final

determinations."[4] At the outset, we fail to see what room will be left for further administrative determinations of the boundaries at issue in the pending San Diego litigation after a final judgment in those proceedings, since the purpose of that litigation is to bring finality to those boundaries. Even if there were to be further Secretarial action, however, we note that, to the best of our knowledge, Congress has not established a statute of limitations with respect to judicial challenges to actions of the Secretary of the Interior except for certain oil and gas leasing decisions (30 U.S.C. §226-2), and we do not believe that this Court should establish a rule that appears to run counter to Congressional policy. Furthermore, the United States' proposal suffers from a lack of fundamental understanding of the Court's rationale for its rejection of unilateral administrative actions as the basis for future water allocations in that it would, in effect, shift the burden of establishing accurate reservation boundaries from the United States to the State Parties. Moreover, when certain California agencies did challenge some of these administrative actions in court, the United States asserted that such agencies had no standing to challenge those actions. Although this Court's March 30, 1983 opinion apparently prompted the United States to withdraw its objection to standing, it nevertheless continues to assert that certain claims are barred by the doctrine of sovereign immunity.

There are a number of other problems with the United States' proposal which dictates that the Court should not

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[4]It is unclear from the United States' proposal what would constitute a "final" administrative decision. As shown by the history of the boundary controversies in this case, "finality" of Secretarial orders is an elusive concept, since they appear readily subject to change.

accept the United States' beguiling invitation to enter such uncharted waters. For example, it is not at all clear that there are "water allocation consequences that naturally flow" from an administrative boundary decision. (U.S. Memorandum, page 8). For a variety of reasons the Secretary may decide not to assert a water right for the added lands, but this might not be known at the time of the boundary action and raises a number of serious problems. Should the States be put to the burden and expense of challenging a boundary determination that may never be the predicate for a water right claim? Should the Secretary be required to give actual notice to the State Parties of his intention to claim a water right at the time of his boundary determination? Would the affected Tribes be bound by his decision not to assert such a claim? Should the Tribes have to challenge the Secretary's failure to claim a water right within a time certain? These are only a few of the pitfalls associated with the United States' proposal, but they suffice to demonstrate its impracticality and inequity.

The United States suggests that the advantage of such a proposal is that it will foreclose the possibility that the State Parties will sit idly by for years before challenging an administrative action, pointing to the State Parties' failure to contest the 1969 Secretarial order regarding the Colorado River Indian Reservation.[5] (U.S. Memorandum, page 8). Once again, the United States misses the point of the Court's decision on the boundary issues. The burden is not upon the State Parties to challenge such orders.

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[5]The United States also urged in these proceedings that there was an "advantage" to accepting unilateral administrative orders as final, but the Court was able to discern none, at least none consistent with basic notions of fair play and due process.

Rather, the responsibility remains with the United States to show the true extent of the boundaries of the reservations.[6] Moreover, until the United States and the Tribes made their recent claims in 1978 that these lands were entitled to water, there was no basis for any legal action by the State Parties. Indeed any such action would have raised ripeness issues.

In an attempt to bolster their reasoning that a one year limitation is appropriate, the United States also faults the State Parties ~~for~~ not agreeing at this time to a 1978 survey change in the location of the northwestern boundary of the Colorado River Indian Reservation, the effect of which is to add additional acreage to the reservation which was not claimed in the original proceedings. The State Parties believe that this issue is more appropriately decided within the context of the pending District Court litigation in San Diego where the Secretary's 1969 order which was the basis for the resurvey approved in 1978 is being challenged. Consequently, the State Parties' reluctance to stipulate to the accuracy of the resurvey at this time will not require the United States "instituting judicial proceedings to vindicate an unchallenged final survey," as it suggests (U.S. Memorandum, page 8).

3. The "subordination" and "change of use" issues

Finally, in Paragraph (E) of its proposed decree the United States requests this Court to place the additional allocation to the Cocopah Tribe based on a 1974 Act of

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6 "The United States, on the other hand, the intervenor with the burden of proving reserved rights, might have instituted appropriate judicial proceedings in the District Courts, in which event the issues tried by the Special Master would presumably have been relitigated." Slip Op. p. 31.

Congress ahead of all other priorities, except those miscellaneous present perfected rights set forth in the 1979 Supplemental Decree. This, of course, is directly contrary to this Court's opinion that:[7]

> "The right accorded dates from June 24, 1974, and hence will not disturb the prior rights of the States or the other parties in this case." Slip Op. p. 35.

The provision requested by the United States, in essence, would mean that *any* additions to a reservation, no matter when or how made, would have a priority ahead of present perfected rights. The subordination clause of the 1979 Supplemental Decree cannot be stretched that far. That clause was a voluntary concession by the State Parties to the Tribes and only applies to those disputed boundary lands which are finally determined to be within a reservation as it had been established at the time of the original proceedings. It was not intended to be applied to lands subsequently added to the reservation, and the State Parties are unwilling to stipulate that it should be so construed. For similar reasons, the State Parties are unwilling to concede that any water allocated to subsequent reservation additions may be used for other than agricultural purposes, as they voluntarily did with respect to pre-1964 reservations in the 1979 Supplemental Decree.

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7 The State Parties recognize that the Special Master, in his report at p. 104, n. 2, indicated his belief that the 1974 addition to the Cocopah Reservation would be entitled to take the paramount priority under the subordination language of the 1979 Supplemental Decree.

4. Conclusion

The proposed Decree of the United States goes far beyond implementing this Court's opinion of March 30, 1983. It seriously distorts that opinion and attempts to usurp the State Parties' rights to litigate issues which have not yet been adjudicated. The United States would have this Court, without the benefit of trial, argument or briefing, rule upon critical issues never presented to the Court. Consequently, the United States' proposed Decree should not be adopted. In contrast, the proposed decree of the State Parties sets forth provisions which encompass only those issues actually ruled upon by the Court. It appropriately leaves other important issues to a later date when they have been appropriately framed by boundary litigation elsewhere. Therefore, we urge its adoption.

Respectfully submitted,

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November 10, 1983

REVISED DECREE PROPOSED BY THE STATE PARTIES

It is ORDERED, ADJUDGED AND DECREED:

I. *For Purposes of this Decree:*

(A) "State Parties" means the State of Arizona, State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, County of San Diego, California and State of Nevada.

(B) "Tribes" means the Colorado River, Fort Mojave, Chemehuevi, Cocopah and Fort Yuma (Quechan) Indian Tribes and the "five reservations" refers to the respective reservations of the above Tribes.

(C) "Prior Proceedings" means the proceedings in Docket Number 8 Original, before Special Master Simon H. Rifkind, which culminated in the 1964 Decree (376 U.S. 340) and proceedings culminating in the 1979 Supplemental Decree (439 U.S. 419).

(D) "Omitted Lands" means lands within the Colorado River and Fort Mojave reservation boundaries as determined by Special Master Rifkind in the prior proceedings or lands which in the prior proceedings were within undisputed reservation boundaries of the Colorado River, Fort Mojave, Chemehuevi, Cocopah and Fort Yuma (Quechan) Reservations which were not claimed to be practicably irrigable in the prior proceedings, but which the United States and/or the Tribes have asserted in the present proceedings are practicably irrigable.

(E) "Boundary Lands" means lands not within the undisputed boundaries of the Colorado River, Fort Mojave, Chemehuevi, Cocopah and Fort Yuma (Quechan) Reservations, but which were purportedly established as reser-

vation lands by virtue of certain orders of the Secretary of the Interior, judicial determinations or acts of Congress subsequent to the 1964 Decree.

II. *Intervention*

The motions of the Tribes to intervene in these proceedings for the purpose of asserting claims for additional reserved water rights for their respective reservations are granted.

III. *Claims of Additional Reserved Water Rights*

(A) "Omitted" Lands

(1) The issue of the reserved water rights of each of the five reservations was fully and fairly adjudicated in prior proceedings resulting in the 1964 Decree of this Court. The principles of finality of judgments bar relitigation of the reserved water rights of the five reservations, subject to adjustment upon final determination of the reservation boundaries as provided in numbered paragraph 5 of the 1979 Supplemental Decree.

(2) The motions of the United States and those of the Tribes to reopen this case for the purpose of presenting claims of additional reserved water rights based upon omitted lands are denied.

(B) Boundary Lands

(1) The 1979 Supplemental Decree provides for appropriate adjustment of the reserved water right determinations of the reservations "in the event that the boundaries of the respective reservations are finally determined."

(2) The term "finally determined" as used in Article II(D)(5) of the 1964 Decree and numbered paragraph 5 of the Supplemental Decree entered on January 9, 1979, means reservation boundary lines determined by a final, non-appealable judicial decision or decree.

(3) Boundary lands added to the reservations with priority dates retroactive to the date of creation of the reservations, by order or other administrative action of the Secretary of the Interior or his delegate, are not "finally determined" within the meaning of Article II(D)(5) of the 1964 Decree or numbered paragraph 5 of the 1979 Supplemental Decree.

(C) The following boundary land claims have not been "finally determined" within the meaning of that term in the 1964 Decree and the 1979 Supplemental Decree. Hence, claims to reserved water rights based upon those lands are denied.

(1) *Colorado River Indian Reservation*

Boundary lands added to the Colorado River Indian Reservation by orders of the Secretary of the Interior issued January 17, 1969 and December 12, 1978 or any judgments based on those orders.

(2) *Fort Mojave Indian Reservation*

Boundary lands added to the Fort Mojave Indian Reservation as a result of the order of the Secretary of the Interior issued June 3, 1974 and the departmental survey approved November 6, 1978.

(3) *Fort Yuma (Quechan) Indian Reservation*

Boundary lands added to the Fort Yuma (Quechan) Indian Reservation as a result of the December 20, 1978 order of the Secretary of the Interior, which approved the December 20, 1978 opinion of the Solicitor of the Department of the Interior.

(4) *Chemehuevi Indian Reservation*

Boundary lands added to the Chemehuevi Indian Reservation as a result of the August 15, 1974 order of the Secretary of the Interior.

(D) The boundary lands determinations made in *Fort Mojave Tribe v. LaFollette*, Civil Action No. 69-324MR (D. Arizona, February 7, 1977) and *Cocopah Tribe of Indians v. Morton*, Civil Action No. 70-573PHX-WEC (D. Arizona, May 12, 1975) are "final determinations" within the meaning of the 1964 and 1979 decrees. In addition, certain other lands are recognized to be part of the Fort Mojave Reservation by agreement of the parties. Adjustment of the water rights of the Fort Mojave and Cocopah Reservations based upon practicably irrigable acreage on such boundary lands are made herein.

(E) Lands added to the Cocopah Indian Reservation by virtue of an Act of Congress of June 24, 1974, 88 Stat. 266, are recognized to be part of the Cocopah Indian Reservation with a priority date of June 24, 1974. Adjustment to the water rights determination of the Reservation based upon practicably irrigable acreage on such boundary lands are made herein.

(F) To implement the findings in Article III(D)(E) herein, paragraphs (2) and (5) of Article II(D) of the 1964 Decree are amended to read as follows:

(2) The Cocopah Indian Reservation in annual quantities:

(a) Not to exceed (i) 7,681 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 1,206 acres and for the satisfaction of related uses, whichever of

(a)(i) or (a)(ii) is less, with a priority date of September 27, 1917;

(b) Not to exceed (i) 2,026 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 318 acres and for the satisfaction of relates uses, whichever of (b)(i) or (b)(ii) is less, with a priority date of June 24, 1974.

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 129,767 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 20,076 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890 for lands transferred by the Executive Order of said date, February 2, 1911, for lands reserved by the Executive Order of said date; provided, further, that the quantities fixed in this paragraph, and paragraphs 1, 2, 3 and 4 shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

(G) To implement the findings in Article III(D)(E), paragraph IA of the 1979 Supplemental Decree is amended to read as follows (footnotes omitted):

(I) ARIZONA

A. Federal Establishments' Present Perfected Rights.

The federal establishments named in Art. II, subdivision (D), paragraphs (2), (4) and (5), of the Decree entered March 9, 1964, in this case, such rights having been decreed in Article II:

Defined Area of Land	*Annual Diversions (Acre-feet)*	*Net Acres*	*Priority Date*
1) Cocopah Indian Reservation	7,681	1,206	Sept. 27, 1917
	2,026	318	June 24, 1974
2) Colorado River Indian Reservation	358,400	53,768	March 3, 1865
	252,016	37,808	Nov. 22, 1873
	51,986	7,799	Nov. 16, 1874
3) Fort Mojave Indian Reservation	27,969	4,327	Sept. 18, 1890
	75,566	11,691	Feb. 2, 1911

IV. Except as specified above or as specified in the 1979 Supplemental Decree, the motion of the United States to reopen and modify the Decree, dated December 1978, the motion of the Fort Mojave, Chemehuevi and Fort Yuma (Quechan) Indian Tribes for leave to intervene as indispensable parties, dated December 23, 1977, the petition of intervention on behalf of the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indian as Amicus Curiae, dated April 7, 1978, and the motion of the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indians as Amicus Curiae, dated April 7, 1978, and the motion of the Colorado River Indian Tribes and the Cocopah Indian Tribes to intervene dated April 10, 1978 are denied.

V. Except as modified above, the 1964 Decree and the 1979 Supplemental Decree shall remain in full force and effect.

Supreme Court, U.S.
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No. 8, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, *et al.*

MOTION OF THE STATE PARTIES TO REOPEN DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS AND SUPPORTING MEMORANDUM

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IN THE

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STATE OF CALIFORNIA, *et al.*

MOTION OF THE STATE PARTIES TO REOPEN DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS

The State of California, the State of Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley Water District ("State Parties") move the Court to reopen *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), pursuant to Article II(D)(5) and Article IX of the Court's Decree in that case, 376 U.S. 340 (1964), in order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations.

The State Parties also request the Court (1) to determine whether the United States' claim for addi-

tional water for the Fort Yuma Indian Reservation resulting from a 1978 redetermination of the boundary of that reservation and asserted in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), is precluded by the doctrine of *res judicata* and (2) if not, to determine the proper boundary of that reservation and the amount and priority of additional water rights, if any, to which the reservation may be entitled. Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims.

These three boundary disputes were before this Court in *Arizona II*. However, the Court directed the State Parties to pursue their then pending action in the United States District Court for the Southern District of California for a determination of the disputed boundaries, which they did. After the district court invalidated the Secretary of the Interior's 1974 Fort Mojave boundary redetermination order, the United States and the Tribes took an interlocutory appeal to the Ninth Circuit, which held that the United States had not waived its sovereign immunity and ordered the case dismissed for lack of jurisdiction. (*The Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987)). This Court granted the State Parties' petition for a writ of certiorari, and on June 12, 1989, the Ninth Circuit's decision was affirmed by an equally divided Court in *California v. United States*, ___ U.S. ___ , 109 S.Ct. 2273 (1989).

In its *Arizona II* decision the Court stated that "[t]here will be time enough, if any of [the United

States'] grounds for dismissal [of the district court action] are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this court." (460 U.S. at 638). For the reasons detailed below the State Parties contend that *Arizona v. California* should promptly be reopened and the three boundary issues and attendant water rights consequences resolved by this Court.

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Counsel of Record
for the State Parties

July 19, 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 8, Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA *et al.*

MEMORANDUM IN SUPPORT OF MOTION TO REOPEN DECREE

This motion is prompted by the urgent need for the State of California, the State of Arizona, The Metropolitan Water District of Southern California ("Metropolitan"), and the Coachella Valley Water District ("Coachella") (all collectively "State Parties") to obtain a determination of the Fort Mojave and Colorado River Indian reservation boundary disputes left unresolved in this Court's 1963 decision in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), and a boundary dispute underlying a claim for additional water for the Fort Yuma Indian Reservation subsequently asserted by the United States in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"). Such determinations are essential so that the reservations' water rights may be finally established in order to facilitate necessary water planning in California and Arizona. The amount of water at issue is about 104,000 acre-feet of diversions in California, which is

enough water to supply about 500,000 people annually in Metropolitan's service area.

Metropolitan imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water pursuant to the Boulder Canyon Project Act (43 U.S.C. § 617 *et seq*).

In *Arizona I*, California's share of the 7.5 million acre-feet of consumptive use of Colorado River water which was allocated to Arizona, Nevada, and California by the Secretary pursuant to the Boulder Canyon Project Act was limited to 4.4 million acre-feet a year, plus one-half of any surplus. In addition, five Indian reservations along the lower Colorado River were awarded "implied" water rights based upon the *Winters* doctrine, *i.e.*, enough water to satisfy the "reasonable needs" of the reservations. (*Winters v. United States*, 207 U.S. 564 (1908)). The "reasonable needs" of the Indians were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. (*Arizona I*, at 600-01). The reservations' priority dates are their dates of creation or the dates of any subsequent additions. Each reservation was created long before Metropolitan's water contracts with the Secretary.

Special Master Simon H. Rifkind had recommended an award to the five mainstream reservations of 905,498 acre-feet of diversions for 135,636 acres of

"practicably irrigable acreage," even though the maximum annual irrigated acreage on those reservations never exceeded 36,000 acres.[1] California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave Reservations were actually within their boundaries. No dispute was raised as to the boundary of the Fort Yuma Reservation since the United States' claim was consistent with long-standing Departmental interpretation of that boundary, which is contrary to the later 1978 Secretarial order on which the United States relied in making its claim for additional water for that reservation in *Arizona II*.[2]

The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who largely rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes here." (*Id.* at 601)[3]. The Court's 1964 Decree never-

[1] California Proposed Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104, and 18F:104, *Arizona v. California* (No. 8, Orig., Oct. Term 1958).

[2] Because the United States failed to make a claim in *Arizona I* for the lands which it purported to add to the Fort Yuma Reservation in 1978, the State Parties believe that the United States' claim for water for those lands is precluded for the same *res judicata* reasons that its claims for so-called "omitted lands" were rejected in *Arizona II*.

[3] Special Master Rifkind had recommended "practicably irrigable acreage" as the measure of the reserved water rights because, *inter alia*, it would "provide certainty for both the United States and non-Indian users." Report of Special Master Simon H. Rifkind at 265 (December 5, 1960). That objective has been frustrated by the unresolved reservation boundary disputes which are the subject of this motion.

theless awarded water rights to the two reservations based upon the Special Master's boundary determinations, "subject to appropriate adjustment by agreement or decree of this court in the event that the boundaries of *the respective reservations* are finally determined." (376 U.S. 340, 345 (emphasis added)). There was no similar qualification of the decreed rights of the Fort Yuma Reservation.

The quantities awarded to Indian reservations by the Court's 1964 decree are charged to the allocation of the state in which the reservation is located. Because of Metropolitan's junior priority, any additional water rights for the reservations in California will necessarily reduce Metropolitan's supply during any year when California's entitlement is restricted to 4.4 million acre-feet. That limitation is no more than several years away now that the Central Arizona Project is on line. Metropolitan has been heavily engaged for a number of years in efforts to obtain a replacement supply for the water that will be diverted to Arizona and must know whether it faces an additional future curtailment in the amount of some or all of the 104,000 acre-feet of diversions involved in the boundary disputes. For example, it has obtained Congressional legislation that would authorize the lining of the All American Canal in California to conserve as much as 100,000 acre-feet of water annually, most of which would become available to Metropolitan. (Pub.

L. No. 100-675, Title II, 102 Stat. 4005; H.R. Rep. No. 780, 100th Cong., 2d Sess. 20-28 (1988)). Similarly, Metropolitan has been in negotiations with Imperial Irrigation District to finance the improvement of Imperial's distribution system to conserve presently wasted water which would be made available to Metropolitan. In a recent decision the California Water Resources Control Board noted that Metropolitan had a substantial present need for the conserved water:[4]

> As the result of wet conditions on the Colorado River since 1983, MWD has been able to divert close to the 1.3 million acre-foot capacity of its Colorado River aqueduct in each of the last five years. . . . Due to the development of the Central Arizona Project and other factors, however, the quantity of Colorado River water available for diversion by MWD on a dependable basis will be restricted to the quantity available under its fourth priority right of 550,000 acre-feet per annum. This quantity is reduced further by approximately 30,000 acre-feet per annum due to current levels of use by other holders of present perfected rights. There is a possibility of additional reductions in the quantity of water available to MWD due to increased use by Indian tribes. . . . The Central Arizona Project began deliveries in 1985 and is expected to utilize its full apportionment in about 1992. . . . *Without the development of additional supplies, the record indicates that MWD faces a potential system-wide shortfall during dry periods of 560,000 acre-feet per annum by the year 2000, increasing to 980,000 acre-feet per annum by 2010.*

[4] *In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* at 10 (September 7, 1988) (Record citations omitted, emphasis added).

In addition to Metropolitan's imminent problems, any additional water rights for that portion of the Fort Yuma Reservation in Arizona will necessarily reduce the supply available to other users in Arizona holding junior rights within Arizona's fixed entitlement of 2.8 million acre-feet.

The three Secretarial Orders which are in dispute were issued in 1969 (Colorado River), 1974 (Fort Mojave) and 1978 (Fort Yuma). There is no disagreement that the proper location of the reservation boundaries is the essential first step in establishing the measure of any implied water rights to which these reservations may be entitled under *Arizona I* or that the Secretary's Fort Mojave and Colorado River reservation boundary orders were based on the same interpretations which Special Master Rifkind had rejected in *Arizona I*. Nor is there any dispute that the 1978 Fort Yuma boundary redetermination overturned three earlier Departmental decisions on that boundary issue dating from 1936. The undisputed result of these unilateral boundary redeterminations was to give each reservation additional acres upon which to base a claim for additional water rights with an earlier priority than Metropolitan's.

The culmination of the Secretary's ex parte boundary determinations was the United States' motion filed in December 1978 to reopen *Arizona I* and, *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within

the added areas. Special Master Elbert P. Tuttle, who was appointed to hear those claims, refused to consider the merits of the Secretary's ex parte orders, accepting the United States' argument that they constituted "final determinations" of the boundaries. Over the objections of the State Parties, he conducted a trial solely on the issue of the irrigability of the added lands and recommended an award to the three Tribes of an additional 104,000 acre-feet of diversions annually.[5] Faced with the denial of their day in court, Metropolitan and Coachella sought review of all three Secretarial boundary orders in the United States District Court for the Southern District of California.

It was against that background that this Court rejected Special Master Tuttle's boundary recommendations and directed the State Parties to pursue their district court action:

> . . . we in no way intended that ex parte secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies or private water users holding priority rights.
>
> * * *
>
> It is clear enough to us, and it should have been clear enough to others, that our 1963

[5] If any of the United States' boundary claims are sustained, the State Parties propose that the trial record developed before Special Master Tuttle be used as the basis for the determination of the practicably irrigable acreage within the added areas, but that all parties have the opportunity to present their views on the amount of practicably irrigable acreage in such areas to the new Special Master.

opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. (*Arizona II*, at 636, 638 (footnote omitted)).

Upon resumption of the district court litigation the parties agreed to address the boundary disputes individually, starting with Fort Mojave. The district court voided the Secretary's Fort Mojave order on the grounds that (1) the Secretary could not exercise his authority to correct allegedly erroneous surveys under 43 U.S.C. § 772 in a manner that would impair Metropolitan's water rights because Metropolitan was a "claimant" protected by the proviso to that statute and (2) in any event, Metropolitan's water supply contracts entitled it to procedural due process protection, which it is had been denied. The district court also held that a de novo trial as to the proper boundary was appropriate under the criteria set forth in *Citi-*

zens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). (*The Metropolitan Water District of Southern California v. United States*, 628 F.Supp. 1018 (S.D. Cal. 1986)).

In response to motions by the United States and the Tribes, the district court certified its decision for an interlocutory appeal to the Ninth Circuit Court of Appeals, which held that the United States had not waived its sovereign immunity and ordered the district court to dismiss the case for lack of jurisdiction. (*The Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987)).

This Court granted the State Parties' petition for a writ of certiorari, and on June 12, 1989 the Ninth Circuit decision was affirmed by an evenly divided court in *California v. United States*, ___ U.S. ___ , 109 S.Ct. 2273 (1989). The effect of the Court's decision is to leave the disputed boundaries unresolved. Until the boundaries are finally determined, the Tribes may not petition this Court for an increase in their Colorado River entitlements, and the State Parties, in particular Metropolitan, will be unable to engage in meaningful water supply planning for the future.

Although the Secretary's boundary decisions *per se* have not yet caused an actual reduction in Metropolitan's supply under its water delivery contracts, they were the basis for the United States' claims for additional water in *Arizona II* and have caused great uncertainty as to Metropolitan's legally available Colorado River water supply and seriously complicated its planning efforts. Thus they clearly present the kind of "threatened injury" which is adequate to sustain jurisdiction under this Court's recent standing decisions abandoning any rigid requirement of "certainty" of injury to a more liberal "probability" of injury. (Davis, 4 *Admin. Law Treatise*, § 24.12 (1983); *Bryant v. Yellen*, 447 U.S. 352 (1980)). Similarly, the Secretarial orders are "ripe" for review even though they have not yet been applied to actually reduce Metropolitan's Colorado River water rights. (*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); Davis, 4 *Admin. Law Treatise*, § 25.6-25.10 (1983)). This is particularly true inasmuch as (1) the Fort Mojave Tribe conceded in *California v. United States*, *supra*, that it is currently diverting and using substantial quantities of water on the disputed area on that reservation[6] and (2) the Colorado River Tribes have circulated for public comment a land use development plan for the disputed area on that reservation.[7]

The State Parties expect the United States and the Tribes to support this motion. The United States told this Court in *California v. United States*, *supra*, that it "has no interest in delaying a final resolution of the boundaries of the three Reservations" and "if, as we urge, the Court affirms the court of appeals' judgment ordering dismissal of this case, the United States will promptly consider what further steps should be taken to bring about an expeditious resolution of these issues." (Brief for the Federal Respondents at 16-17, *California v. United States*, *supra*). It specifically suggested reopening *Arizona v. California* (*id.* at 49, note 36):

---

[6] Brief of the Tribal Respondents, *California v. United States*, U.S. ___ , 109 S.Ct. 2273 (1989).

[7] The State Parties' assertion of this development in *California v. United States* (Brief for the Petitioners at 17) was not disputed by the Colorado River Tribes in their brief in response.

> One possibility would be for the parties to file a joint motion in *Arizona v. California* requesting the Court to resolve the boundary issue as part of a final resolution of the United States' claim of water rights for the Fort Mojave and other Reservations. Indeed, petitioners presumably could file such a motion on their own behalf, since the United States has already submitted its water-right claims for the Fort Mojave Reservation to this Court for resolution in *Arizona v. California* and sovereign immunity therefore would not bar the Court from proceeding to a resolution of those claims for the 3500 acres at issue here on the motion of another party to that case.

The Tribes agreed that "such a course of action might be the most expeditious way to resolve the boundary issues." (Brief of the Tribal Respondents at 28, *California v. United States*, *supra*).

CONCLUSION

The State Parties urge the Court to reopen *Arizona v. California* for the purpose of resolving the disputed boundary issues on the Fort Mojave and Colorado River Indian Reservations, as well as the Fort Yuma Indian Reservation claim, so that the water rights entitlements of those reservations may be finally determined in order to facilitate necessary water development planning by the State Parties.

Respectfully submitted,

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ON MOTION OF THE STATE PARTIES TO REOPEN THE DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS

RESPONSE OF THE UNITED STATES

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ON MOTION OF THE STATE PARTIES TO REOPEN THE DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS

RESPONSE OF THE UNITED STATES

The States of Arizona and California, the Metropolitan Water District of Southern California, and the Coachella Valley Water District (hereinafter the State parties) have moved to reopen the Decree in this case so that the Court may determine: (1) the disputed boundaries of the Fort Mojave, Colorado River and Fort Yuma Indian Reservations, and (2) the amount and priority of reserved water rights for any lands that the Court finds, upon resolution of the boundary disputes, to be part of the Reservations. The United States agrees that the Court now should fix the

disputed boundaries of the three Reservations for purposes of deciding whether the United States is entitled to additional reserved water rights for the three Reservations.

STATEMENT

In *Arizona* v. *California*, 373 U.S. 546 (1963), Special Master Rifkind determined the disputed boundaries of the Colorado River and Fort Mojave Reservations, concluding that the additional lands for which the United States claimed water were not part of those Reservations. However, the Court, at the urging of the State of California, declined to resolve the boundary disputes at that time, observing: "Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Id.* at 601. The Court's original Decree in this case, which was entered in 1964, included an award of specified quantities of water for the Colorado River and Fort Mojave Reservations (as well as other Indian and federal reservations), but Article II(D)(5) provided that the quantities fixed for those two Reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. 340, 345. The Supplemental Decree entered by the Court in 1979 on the joint motion of all parties similarly provided that the quantities of water awarded for all five Indian Reservations "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 439 U.S. 419, 421.

Between 1969 and 1978, the Secretary of the Interior issued a series of orders that corrected the boundaries of the Fort Mojave, Colorado River, and Fort Yuma Reservations. The United States then filed a motion in this original action in 1978 for a supplemental decree awarding additional reserved water rights to the United States for the irrigable lands within the boundaries of the three Reservations, as recently ascertained by the Secretary of the Interior. In *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona* v. *California II*), the Court held that the Secretary's administrative actions did not constitute "final determinations" of the boundaries of the three Reservations within the meaning of the Decree and Supplemental Decree, and that those actions therefore were insufficient bases for the Court to award additional water rights to the United States. 460 U.S. at 636-637. The Court also declined at that time to order that the disputed boundaries be determined in this original action. The Court noted that there ~~were~~ was then pending in the United States District Court for the Southern District of California a suit brought by the Metropolitan Water District (MWD) challenging the Secretary's administrative orders fixing the boundaries of the three Reservations, and the Court was unconvinced that the district court action was not an available and suitable forum for resolution of the boundary disputes. 460 U.S. at 637-639.

In the suit brought by the MWD, to which this Court referred in *Arizona* v. *California II*, the district court entered an interlocutory order on February 25, 1986, setting aside the Secretary's orders under the Administrative Procedure Act, 5 U.S.C. 706(2)(C) and (D). The district court also stated its intention to hold a trial de novo on the question of the location of the reservation boundaries. *Metropolitan Water District of Southern California* v. *United States*, 628 F. Supp. 1018 (S.D. Cal. 1986). The district court certified its order for interlocutory appeal. The Ninth Circuit accepted the appeal and held that the suit must be dismissed for lack of jurisdiction because the

Quiet Title Act (QTA), 28 U.S.C. 2409a, is the exclusive basis for challenging the United States' title to real property and exceptions to the waiver of sovereign immunity in the QTA forbid the relief sought by MWD. *Metropolitan Water District of Southern California* v. *United States*, 830 F.2d 139 (9th Cir. 1987). This Court affirmed the Ninth Circuit's judgment by an equally divided Court. *California* v. *United States*, 109 S. Ct. 2273 (1989).

DISCUSSION

The United States agrees with the State parties that this original action is the appropriate forum for judicial resolution of disputes concerning the boundaries of the Fort Mojave, Colorado River, and Fort Yuma Indian Reservations—at least where, as here, a judicial resolution is sought only for the purpose of finally quantifying the water rights that were reserved by the United States for those Reservations. The United States intervened in this original action to obtain a determination by this Court of the quantity of Colorado River water to which the United States is entitled for various federal reservations, including the three Indian Reservations at issue here. The United States then filed its motion for modification of the original Decree in 1978 to seek additional water for lands encompassed by the boundaries of the three Reservations, as ascertained by the Secretary of the Interior in his then-recent orders. As this Court has held, the United States reserved water for all land in those Reservations that is practicably irrigable. 373 U.S. at 600-601; 439 U.S. at 421-422. Accordingly, a determination of the amount of *land* that was reserved for the benefit of the three Tribes is a necessary step in the judical determination of the amount

of *water* that was reserved for that purpose. Since the latter question must be decided in this original action, it is logical that the antecedent question concerning reservation boundaries should be as well.

We recognize that in *Arizona* v. *California II*, the Court expressed the view that the boundary disputes should be resolved in another forum if possible, and the Court noted that MWD's suit against the United States in the Southern District of California might be an available forum for that purpose. But as a result of this Court's affirmance last Term of the Ninth Circuit's jurisdictional ruling in *California* v. *United States*, that alternative forum is unavailable. Especially in light of that ruling, we agree with the State parties' view that this original action now is the most appropriate forum for bringing to a prompt conclusion the longstanding disputes over the location of the boundaries of the three Reservations.[1]

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[1] In the typical case, the United States might seek to resolve a dispute concerning the boundary of public lands by filing a quiet title suit in federal district court against the persons who also claim an interest in the land. But because the State parties do not claim title to the lands that are the subject of the boundary disputes involving the three Indian Reservations, the United States cannot bring about a judicial resolution of those disputes by filing a quiet title suit against the State parties in federal district court.

The State parties are interested in the location of the boundaries only because of the effect that the boundary determinations will have on their water rights. It therefore is appropriate for any judicial resolution of the boundary disputes in this context to occur as part of the overall resolution of the competing water-right claims that are before the Court in this original action. If the boundary disputes were split off for separate resolution in a suit brought by the United States in federal district court, the ultimate resolution of the underlying water-rights controversy could be subject to extended delay resulting from trial and appellate proceedings and possible review in this Court—only to be followed by still further proceedings in this Court con-

We do not believe, however, that it is necessary for the Court to "reopen" its Decree in order to fix the boundaries of the Reservations for this purpose and to quantify the amount of additional water reserved by the United States. The Decree and Supplemental Decree expressly provide that the quantities of water awarded to the United States for the Reservations are subject to adjustment in the event that the boundaries are finally determined. 376 U.S. at 345; 439 U.S. at 421. This Court's determination of the boundaries, as part of its quantification of the United States' water rights, therefore would be pursuant to the Decree and Supplemental Decree, not in derogation thereof. Accordingly, no reopening of the Decree and Supplemental Decree is required.

If the State parties' motion is treated as a motion for the Court to make a final determination of the reservation boundaries and additional water rights as provided by the Decree and Supplemental Decree themselves, the United States joins in the State parties' motion and suggests that the matter be referred to a Special Master. The effect of our submission is to renew the motion filed by the United States in this original action in 1978 insofar as that motion sought an award of additional water rights to the United States for the lands that are the subject of the boundary disputes.[2] Hence there is no impediment to these further

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cerning the quantity and priority of water rights to be awarded for any additional lands that were found in the separate proceedings to be part of the Reservations. By contrast, all necessary determinations can be consolidated in a single proceeding in the original action in this Court.

[2] Of course, in light of *Arizona* v. *California II*, *supra*, we do not suggest, as we did in 1978, that the Court should give conclusive effect for present purposes to the Secretary's administrative determinations of the boundaries of the three Reservations.

proceedings because of lack of consent by the United States to be sued.[3]

CONCLUSION

The State parties' motion should be granted insofar as it requests this Court (1) to fix the disputed boundaries of the Fort Mojave, Colorado River, and Fort Yuma Reservations for purposes of determining whether the United States reserved water for those Reservations in addition to that awarded in the Decree and Supplemental Decree, and (2) to determine the amount and priority of any further water rights reserved by the United States. We suggest that the matter be referred to a Special Master for the receipt of evidence and submission of a report and recommended decree.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

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[3] In order to expedite resolution of the underlying water-rights controversy, the trial record developed before Special Master Tuttle may be used as an evidentiary basis for the determination in further proceedings of the amount of practicably irrigable acreage for which the United States claims additional water rights. The State parties have made a similar suggestion. See Brief in Support of Motion at 10 n.5.

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In The

Supreme Court of the United States

October Term, 1989

State of Arizona,

Complainant,

v.

State of California, *et al.*

RESPONSE OF THE TRIBES TO THE MOTION OF THE STATE PARTIES TO REOPEN DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS

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RESPONSE OF THE TRIBES TO THE MOTION OF THE STATE PARTIES TO REOPEN DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS

I. INTRODUCTION

This Memorandum is filed by the Fort Mojave Indian Tribe, the Colorado River Indian Tribes and the Quechan Indian Tribe of the Fort Yuma Indian Reservation (hereinafter "the Tribes") in response to the motion to reopen the Decree in *Arizona v. California*,[1] filed on July 19, 1989 by the States of California and Arizona, the Metropolitan Water District of Southern California, and the Coachella

[1] 373 U.S. 546 (1963), *Decree*, 376 U.S. 340 (1964), *Supplemental Decree*, 439 U.S. 419 (1979), 460 U.S. 605 (1983), *Second Supplemental Decree*, 466 U.S. 144 (1984).

Valley Water District (hereinafter "the State Parties"). The State Parties seek to ascertain the impact on their Colorado River water supply of three orders of the Secretary of the Interior. Those orders recognized the proper location of the historical boundaries of the Colorado River, Fort Mojave and Fort Yuma Indian Reservations and resulted in the inclusion of additional lands, formerly considered to be part of the public domain, in the Reservations to be held in trust for the benefit of the Tribes. The Tribes support the reopening of the Decree to determine the effect of the Secretary's actions on the tribal water rights.

II. POSITION OF THE TRIBES

The Tribes request the referral of this controversy to a Special Master to make a recommendation to the Court whether the quantity of present perfected rights allocated for use on the Reservations should be increased to reflect the additional lands now held in trust for the benefit of the Tribes. In 1978, the Tribes, joined by the United States, asked the Court to reopen the Decree in this case in order to recognize additional water rights for use on these lands. *See* 460 U.S. at 612. The reasons underlying the Tribes' prior request remain valid today. Until the water rights issues surrounding these lands are resolved and Article II(D) of the Decree is amended, the Tribes will not be able to utilize the lands for the purposes for which they were reserved.

Although the Court rejected the Tribes' prior request, stating that "if at all possible" the boundary disputes

should be settled in "other forums", 460 U.S. at 638, future consideration of the issue was left open. The Court referred to a then-pending action in district court filed by the Metropolitan Water District and stated that if that action was dismissed on jurisdictional grounds, "there will be time enough . . . to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court." 460 U.S. at 638. The attempt to obtain review in another forum proved unsuccessful. The Court's recent *per curiam* order affirmed the Ninth Circuit Court of Appeals' dismissal of the district court action. *California v. United States*, ___ U.S. ___, 109 S. Ct. 2273 (1989).

As a result, the Tribes respectfully request the Court to decide whether the inclusion of these lands in the Reservations warrants the recognition of additional present perfected rights for use on the Reservations. No other forum is available to determine the ultimate issue of the water rights for these lands. Nor can the issues be narrowed or limited by ancillary proceedings elsewhere. For these reasons, as the State Parties suggest, it is appropriate to reopen the Decree.

At the same time, the Tribes do not agree with many of the contentions in the State Parties' Motion and Supporting Memorandum. First, it is entirely proper to address the water rights for all three Reservations. There is no *res judicata* bar with respect to the Fort Yuma (Quechan) boundary. This Court's 1979 Supplemental Decree – to which the State Parties agreed – expressly provided that the water allocations for use on all the Reservations, including those for the Fort Yuma Reservation, are subject to adjustment "in the event that the boundaries of the

respective reservations are finally determined." 439 U.S. at 421.[2] Thus, the State Parties are plainly mistaken in arguing that the doctrine of finality precludes consideration of the claims at Fort Yuma.

The State Parties also err to the extent that they ask this Court to determine the boundaries of the Reservations or the title to the lands within the boundaries recognized by the Secretary. The boundaries of the Reservations and the title to the lands within those boundaries are simply not part of this litigation and have been finally determined. Since the State Parties concede that they have no interest in the disputed lands, they may not challenge the Secretary's treatment of the lands as part of the Reservations. *See, e.g., Knight v. United States Land Ass'n*, 142 U.S. 161, 176-78 (1891); *Cragin v. Powell*, 128 U.S. 691, 699 (1888). At the urging of California, this Court previously refused to address the so called "title" question. 373 U.S. at 601, 460 U.S. at 636; *see also California v. United States, supra*. There is no reason to deviate from that refusal now.

The sanctity of the Secretary's orders recognizing the disputed lands as part of the Reservations does not preclude the adjudication of the critical contours of the water rights for the Reservation lands. Indeed, the State Parties are fully protected. For the Tribes to receive additional present perfected rights, this Court must agree with the

---

[2] The State Parties' present motion is the first time in the ten years in which this issue has been before the courts that the State Parties have asserted that *res judicata* bars consideration of the water rights involving the lands subject to the Secretary's order at Fort Yuma.

Secretary's conclusion that the questioned lands have always been part of the Reservations and are therefore entitled to present perfected rights. *See* 376 U.S. at 341, 343-45. In short, even though they may not dispossess the Tribes from their lands, the State Parties will have ample opportunity to challenge the reasoning of the Secretary's decisions with which they disagree. The State Parties, however, insist on blurring the distinction between adjudicating the title to the lands and determining the priority date for the associated water rights. That distinction is critical to the Tribes who do not believe that they are required to jeopardize their interests in the lands in order to seek a dependable water supply. *See* 28 U.S.C. § 2409a (1982 & Supp. V 1987).

Finally, the Tribes share the view of the State Parties that the record established before Special Master Tuttle on the amount of practicably irrigable acres within the disputed areas is sufficient for the resolution of that question.[3] At most, the parties only need to present further argument on this issue to a newly appointed Master. The irrigability of these lands was thoroughly litigated before the previous Special Master during nearly eight weeks of trial and his comprehensive report fully explains the differing presentations. There is no need to repeat that costly and time consuming effort.[4]

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[3] There is no dispute over the quantification standard to be applied. According to the 1979 Supplemental Decree, the rights for the disputed lands are to be quantified based on the amount of practicably irrigable acreage within the newly recognized boundaries. 439 U.S. at 421-22.

[4] The State Parties conceded the irrigability of much of the disputed lands before both Special Master Tuttle and Special Master Rifkind.

III. CONCLUSION

For these reasons, the Tribes support the referral to a Special Master of the limited question of whether the Decree in this case should be amended to increase the present perfected rights decreed for the benefit of the Tribes in order that a dependable water supply will be available for use on the additional lands now recognized as part of the Reservations.

Dated: September 1, 1989

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Before The Special Master — Frank J. McGarr

MEMORANDUM OPINION, REPORT AND ORDER NO. 14

September 20, 1993

18 pp

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

STATE OF ARIZONA, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	)	No. 8, ORIGINAL **MEMORANDUM OPINION AND ORDER NO. 14**

An Opinion of the Special Master dated November 4, 1992 addressed a Rule 56 motion by the State Parties for Summary Judgment. The judgment sought was a ruling that the Executive Order of May 15, 1876 established the west bank of the Colorado River, subject to the rules governing erosion, accretion and avulsion, as a portion of the western boundary of the Colorado River Indian Reservation. The motion was denied for the reason that there were disputes as to the facts and circumstances surrounding the issuance of that order which required a hearing.

That hearing has been completed and post-hearing memoranda and proposed findings of fact have been filed. By agreement of the parties, the sole issue to be resolved is the meaning of the Executive Order of 1876 and whether the disputed portion of that order establishing the western boundary of the Colorado River Indian Reservation intended the boundary to be a fixed line or a riparian boundary. It is that issue which is the subject of this opinion.

Before particular findings are made, a discussion of some general issues are appropriate. At the outset it should

be observed that a call to the bank of a river clearly indicates an intent to create a riparian boundary. The burden of proving otherwise, which here falls on the United States and the Tribes, is a substantial one.

The Colorado River Indian Reservation was created by Congress in the Arizona Territory by an Act of March 31, 1865 and that Act established the Colorado River as the reservation's western boundary. An addition to the reservation by virtue of an Executive Order of November 27, 1873 added additional lands and continued to refer to the reservation as bordered on the west by the Colorado River.

At the instance of the Reservation's Indian Agent Tonner, the reservation was further expanded by an Executive Order of November 16, 1874. The order incorporated Tonner's sketch and boundary description which mislocated two of the landmarks forming points on the boundary resulting, as a later survey revealed, in cutting off a large tract of land between the East boundary of the reservation and the river, a result clearly not intended by Tonner and in fact thwarting his stated purposes in the proposed enlarging of the reservation in the first instance.

The discovery of this evident mistake prompted Tonner's successor as Indian Agent, one W.E. Morford to seek a correction and his proposal resulted in the Executive Order of May 15, 1876. The language of that order pertinent here establishes the western boundary of the reservation as a direct line from the top of Riverside Mountain to the west bank of the Colorado River ". . . thence down said west bank to a point opposite the place of beginning. . . ."

It is central to the position of the United States and the Tribes that the Order of 1876 must be interpreted

to include the purposes of the Order of 1874. Agent Tonner was the progenitor of the Order of 1874 and it may be assumed to satisfy his stated concerns. The mistake agent Tonner made created a serious situation depriving the Reservation of contiguity with the river for a substantial distance, a mistake which clearly demanded correction. But the mistake was discovered after Tonner had been replaced as Indian Agent by Agent Morford and there is no evidence that Morford had any other purpose than to correct the unacceptable anomaly of the significant reduction of the Reservation and its separation from the life giving river. Whether Morford in his recommendations which led up to the corrective Executive Order of 1876 shared Tonner's goals or even knew of them is a question not answered in this record. This leaves us with the necessary conclusion that we must regard the 1876 Executive Order as free of ambiguity and in its plain meaning, controlling here. It is further evident that despite some resourceful arguments to the contrary, the phrase "west bank" meant in 1876 what it means today; that is that line formed where the water meets the land.

The historical record makes it clear that a salient feature of the government's intent and an essential element of the Indian's welfare was access to the river, both for the agricultural richness of bottom land soil and for the harvest of the bounty of the river. This circumstance argues against the concept of a fixed line boundary which could foreseeably separate the reservation from the river by the changing of its channel. The record supports the contention that to give the Indians the benefit of the river, Tonner sought a fixed line to the west of the river to give the reservation land on both sides of the river, thus eliminating the meandering river problem. The 1876

order correcting his mistake however, lost sight of this goal and simply restored to the reservation the land on the east side of the river which Tonner had unintentionally deprived them of. The overriding goal of giving the Indians the benefit of riparian access to the river was thus satisfied. Tying the western boundary of the reservation to the river solved a problem caused by the moving river channel.

Tonner's original plan to solve the problem of a moving river as a boundary was not to establish a fixed line, in lieu of the river, but to solve the problem by putting the reservation on both sides of the river. That his mistake and the subsequent correction nullified that goal does not compel any reading of the phrase "west bank" other than its plain intendment.

There is no doubt that Tonner intended a Reservation of total fixed boundaries including land on both sides of the river, and so did the Executive Order of 1874 which Tonner's recommendations inspired. When the order was discovered to have unacceptable consequences and was corrected by the order of 1876, it is tempting but inappropriate to try to read 1874 intentions into the 1876 Order, but whether by design or omission, the 1876 Order abandons the concept of land west of the river and its plain meaning cannot be ignored. The contrasting arguments of the parties as to the fact that the 1876 Order did not disavow or reaffirm the intentions of the 1874 Order are of no consequence. It did neither and therefore, as the controlling language in this case, it stands alone. The Executive Order did what it did. Its intent was to do what it said it was doing and the 1876 order said it was making the west bank of the river the reservation boundary. So unless "west bank" means something other than the western shore of the river where the water meets the

land, the river and not a fixed line is the boundary of the reservation.

So we turn to "west bank" and the meanings that might be read into that phrase. The Tribes and the United States argue that the west bank means the bluff to the west of the river. The argument is to the effect that the intention of the United States to solve the moving boundary problem is evidenced by the fact that Morford's language making the "river" the boundary was changed in the Executive Order to the "west bank" of the river. This is speculation as to intent. It may just as well be the fact that since the fixed line meets the river on its west side, the phrase "west bank" seemed more precise to the drafter, and if the drafter of the order intended in fact to describe a boundary which would include in the reservation a large area of land west of the river, he could have sensibly accomplished this by referring to the bluff itself, a somewhat vague boundary, or more precisely, establishing a fixed line following the outlines of the bluff.

Two esteemed experts testified, and of course disagreed, as to the meaning and intent behind the phrase west bank. To the extent that the experts uncovered documents and drew up historical knowledge relevant to the issues, they were helpful and their contribution to the case is appreciated. To the extent that either of them indulged in speculation as to the intentions of the actors in the 1874-86 events, those speculations have been argued by counsel and treated in this opinion and need not be further discussed. Speculation, however appealing or well intended does not form an adequate foundation for legal conclusions.

Such speculations, pro and con, drive us back to the real issue of what the drafter meant by west bank as measured, not by his presumed intent, but by what he said.

The United States and the Tribes rely on the Canons of construction in support of the Tribes' claims. It is true that there is a well established Canon on construction mandating the resolution of doubtful meanings in favor of Indian claims. But it is not applicable here because there is no ambiguity in the meaning of the phrase "west bank" and this rule of construction does not apply.

There is no convincing evidence that "bank" in 1876 meant anything different than it does today. To quote documents of the time to the effect that a tribe was located "on the east bank" or that a tribe was allowed by treaty to occupy lands on the right bank of the river is to look to a different usage and context than found here, and these phrases are not contrary to the conclusion that "bank" used in a boundary description means the edge of the water. The treaty between the Mojaves and Chemehuevis which allowed the latter to occupy lands on the "right bank" of the river merely established the river bank as one boundary of the ceded land.

The Tribes and the United States argue further that a letter dated October 11, 1877 from Commissioner of Indian Affairs Hayt demonstrates a belief that the Colorado River Indian Reservation lay on both sides of the river. Hayt's reliance on the Executive Order of 1874 which was designed to achieve this result is apparent, but he seems unaware that the corrective order of 1876 undid that result.

Hayt's letter must be seen in a broader context than the document alone. In 1877 a private citizen, named Snyder wrote to the General Land Office about misuse of lands in the Palo Verde Valley to the detriment of the Chemehuevi Indians. The land office referred the letter to the Commissioner of Indian Affairs who in a letter dated 1877 stated that the 1874 Order and 1876 Amendment created

a Colorado River Indian Reservation which included the land which was the subject of Mr. Snyder's concern, on the California side of the river.

The addressee of Commissioner Hayt's letter was General Land Office Commissioner Williamson who disagreed with Hayt's conclusion as to the boundary of the reservation, and the Secretary of the Interior who was superior to both seems to have acquiesced to Williamson's view. Under these circumstances, Hayt's view deserves little weight, especially in view of the fact that over the subsequent years the Department of the Interior and the Indian Office read the 1876 Order to establish a moving river boundary. A bank is a bank. A bluff is a bluff. If a bluff was intended as a boundary, it could have been denominated as such. There is no historical record that in the formulation of the Executive Order of 1876, anyone involved considered a bluff to be a boundary. There is no indication that anyone knew of the bluff or its location or of the quantity of land which would be added to the reservation by regarding the bluff rather than the river shore as the reservation boundary.

The fact that in 1881 the Secretary of the Interior transferred 40,000 acres of the disputed area to the State of California for private development argues strongly for the position that these were not believed to be Reservation lands.

The United States and the Tribes in their argument for the geologic bluff as the true meaning of the west bank would substitute for the clearly ascertainable actual river bank, an indeterminate line farther west delineated by a vague and not continuous geological feature. The difficulties created by the meandering river are no greater than the difficulties occasioned by the determination of this vaguely described line.

Neither does the record compel the conclusion that the 1874 order was to create, among other things, the expansion of the reservation into California for the benefit of the Chemehuevis. Whether Tonner had this intention does not now matter. He intended a fixed line west of the river. He made a mistake and the correction of the mistake created a reservation boundary that did not go west of the west bank of the river. While it can be argued that in isolated instances, one possible interpretation of a writing or a circumstance supports the conclusion that the Executive Order of 1876 contemplated a fixed line including land west of the river in the Colorado River Indian Reservation, the manifest weight of the evidence is to the contrary.

Further strong evidence in support of this conclusion is the fact that the United States and the Tribes filed pleadings in the case of *U.S. v. Aranson*, 696 F.2d 654 (9th Cir.) *cert. denied* 464 U.S. 982 (1983). While the contention was rejected in this instant case in the Opinion of November 4, 1992 on summary judgment that *Aranson* was the basis of judicial estoppel, the earlier position of the United States and the Tribes in the *Aranson* case is a factor which has evidentiary weight in the determination of the issue addressed herein. In the *Aranson* case the Government and the Tribes unequivocally urged upon the Court the position that the Colorado River was the moving boundary of the reservation, and that contention has relevance here. Judgment on this issue must be for the State Parties. There is no ambiguity in the Order of 1876 in its call to "the west bank of the Colorado River." The boundary thus described is where the water and the land meet, subject, as it must be, to the rules of erosion, accretion and avulsion.

In support of and in furtherance of this determination the following findings of fact and conclusions of law are entered herewith:

1. The Colorado River Indian Reservation ("Reservation") was created by Congress in the Arizona Territory by the Act of March 3, 1865 (13 Stat. 541, 559), which provided that:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

AI U.S. Ex. 501. That Act established the Colorado River as the Reservation's western boundary.

2. An Executive Order of November 27, 1873, added certain adjoining lands in Arizona to the Reservation, including bottom lands to the south of the original Reservation also bordered "on the west by the Colorado River." AI U.S. Ex. 503. That order continued the Colorado River as the Reservation's western boundary.

3. On October 22, 1874, Reservation Indian Agent J.A. Tonner wrote to the Commissioner of Indian Affairs recommending another extension of the Reservation both within Arizona and across the river into California, expressing concern about (1) "encroachments" on the Reservation by "worthless whites and Mexicans," (2) "transfers of land by change of channel in the Colorado River," and (3) "avoiding future trouble by including all arable land in the vicinity of the reservation" within its boundaries. SP Ex. 4.

Tonner included language for an Executive Order which redefined the boundaries of the total Reservation entire-

ly by lines connecting identifiable natural monuments. A sketch map included with his description resembled a lopsided rectangle with the Colorado River flowing through the middle of the proposed expanded Reservation. SP Ex. 4. Neither Tonner's letter, diagram nor proposed Executive Order mentioned or identified a high bluff to the west of the Colorado River as part of the boundary in California. Two of the major connected landmarks shown on Tonner's sketch and referenced in his boundary description were substantially mislocated. Only a small portion of the arable lands in the northeastern corner of the Palo Verde Valley in California were shown within the expanded Reservation.

4. Commissioner of Indian Affairs E.P. Smith forwarded Tonner's proposed Executive Order to the Secretary of the Interior and recommended that it be issued. The Secretary concurred and forwarded it to President Grant, who issued it on November 16, 1874 ("1874 Order"). AI U.S. Ex. 504. Neither letter mentioned a high bluff to the west of the Colorado River as part of the boundary in California.

5. The Chemehuevi Tribe of Indians in California were among the tribes identified for settlement on the Reservation when it was created in Arizona in 1865, but hostile relations with the Mojave Tribe resulted in the Chemehuevis staying in their traditional areas on the west bank of the Colorado River.

Tonner's 1874 recommendation did not state that a purpose of the proposed expansion was to include the Chemehuevis within the expanded boundaries of the Reservation in California, nor did the subsequent correspondence and the 1874 Order. Tonner's boundary description would only have included their settlement in the Riverside Mountain

area and his sketch map would only have included a small portion of their settlement in the northeastern Palo Verde Valley.

6. A survey of the enlarged Reservation was requested by Commissioner Smith and conducted by the General Land Office ("GLO") in November 1875. The approved survey showed that a boundary line from the top of Riverside Mountain, California, southeasterly to the point of beginning at La Paz Arroyo in Arizona, which line Tonner had shown to be entirely west of the river because he mislocated Riverside Mountain, actually crossed the river and ran in large part on its east side, leaving a substantial block of land in Arizona between the new Reservation boundary and the Colorado River to the west. SP Ex. 5.

7. In December 1875 W.E. Morford replaced Tonner as Indian Agent. There is no evidence that Tonner, who had been absent from the Reservation for most of 1875, had ever briefed Morford on his earlier 1874 boundary recommendation. Morford informed J.Q. Smith, the new Commissioner of Indian Affairs, in early 1876 that the 1874 Order "cuts off a large tract of very valuable land upon the east side of the River, and gives a very strong foothold to a certain class of men that desire to be in close proximity to the Indians, for unlawful and improper purposes." Morford therefore requested that an Executive Order be issued to change the boundary line "between Riverside Mountain and La Paz Arroyo, making the Colorado River the boundary line" instead. AI U.S. Ex. 505a. He stated no other purpose than to restore the severed lands in Arizona, nor did he mention Tonner or Tonner's reasons for expanding the Reservation.

8. Mr. S.A. Galpin, a clerk in the Commissioner's office, "acting" as Commissioner for newly appointed J.Q. Smith,

prepared a proposed Executive Order and submitted it to the Secretary of the Interior on May 10, 1876. Twice referencing Morford's letter, Galpin requested that the President change the Reservation boundary between Riverside Mountain and La Paz Arroyo "so that when it reaches the west bank of the Colorado River, it follow said west bank down the river . . . ." With one exception, the proposed order repeated verbatim the 1874 Order's description of the Reservation boundaries. The change was that the direct line from Riverside Mountain to La Paz Arroyo now stopped when it reached the "west bank of the Colorado River" and the remainder of the western boundary was described as the "west bank" down the river to the Arroyo (AI U.S. Ex. 505):

> . . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning [still at a point where La Paz Arroyo enters the Colorado River, four miles above Ehrenberg in Arizona].

AI U.S. Ex. 505b. Acting Secretary of the Interior Gorham immediately forwarded the Executive Order to President Grant with a recommendation that it be signed. AI U.S. Ex. 505c. Neither the Acting Commissioner nor the Acting Secretary mentioned Tonner or his previously stated purposes in requesting an expansion of the Reservation.

9. President Grant's Executive Order of May 15, 1876 ("1876 Order") tracked the language of the order forwarded to him. By way of explanation, it noted that the 1874 Order, while adding new lands to the Reservation in California, had failed to include some of the land in Arizona which had been made part of the Reservation by the 1865

Act and the 1873 Executive Order. It also stated "the order of November 16, 1874 did not revoke the order of November 22, 1873" and that "all lands withdrawn from sale by either of these orders are still set apart for Indian purposes . . . ." It did not mention Tonner or any other purposes of the order. AI U.S. Ex. 505.

10. On May 18, 1876, Commissioner of Indian Affairs J.Q. Smith forwarded a copy of the Executive Order to Agent Morford, which he described as "covering the limits of the two previous orders." He did not inform Morford that his recommendation had been altered in any way. AI Calif. Ex. 3530-B.

11. The portion of the Reservation boundary established by the 1876 Order below the point where the boundary line south from Riverside Mountain intersects the west bank of the Colorado River is referred to in these Findings as the "disputed area."

12. No survey of the modified western boundary of the Reservation in the disputed area established by the 1876 Order was requested by the Commissioner of Indian Affairs or conducted by the General Land Office following its issuance. In response to an inquiry in January 1878, however, General Land Office Commissioner Williamson explained why no survey had been conducted of that area: "[s]ince the reservation is bounded by natural limits, to-wit, the west bank of the river, no actual survey of the meanders of the same has since been made." SP Ex. 16. That same year a survey of certain public lands in California in the vicinity of Riverside Mountain and below was carried out by W.F. Benson. The approved survey plats show no Reservation land in the disputed area. SP Exs. 6, 6H and 6I.

13. All of the maps of the Reservation in the *Arizona I* record, which were incorporated into the record of this proceeding, and 12 additional maps introduced by the State Parties in this proceeding, prepared by the Bureau of Indian Affairs and various other federal agencies from 1913-1955, *i.e.*, prior to the United States' presentation of evidence in support of its water claims for the Colorado River Indian Tribes in *Arizona I*, show the Colorado River as the western boundary of the Reservation in the disputed area.[1] None show a fixed boundary line anywhere west of the river.

14. Dr. Fred Nicklason, the United States' expert historian in these proceedings, uncovered no maps prepared prior to the presentation of the United States' evidence in *Arizona I* showing the disputed area to be part of the Reservation. SP Ex. 7.

15. In February 1874 an official survey was conducted of certain public lands in California opposite the southern end of the Reservation by O.P. Callaway which identified a substantial area of those lands as "swamp and overflowed." The Callaway survey was approved in December 1874. CRIT Ex. 9.

In the Fall of 1877, a difference of opinion arose between the Commissioner of Indian Affairs and the Commissioner of the General Land Office over whether the lands surveyed by Callaway were Indian trust lands within the boundaries of the Reservation or were still public lands. GLO Commissioner Williamson advised Secretary of the Interior Schurz that the lands "appear to be wholly outside the boundaries of the Indian Reservation." SP Ex.

[1] AI Calif. Exs. 2617A-2617C (Tr. 14, 228-35), 3532-3534 (Tr. 20, 257-60), 3538, 3544 (Tr. 20, 309-13); SP Exs. 6 and 6J.

31-33. In May 1878 Secretary Schurz approved and transmitted a list of those lands to the State of California as their entitlement under the Swamp and Overflowed Lands Act of 1850. A patent was issued to the State for the lands in 1890. SP Exs. 36, 27.

16. The record in *Arizona I* shows that, as of the date of trial in 1958, (1) a substantial portion of the disputed area, including the swamp and overflowed lands transferred to California, was then either irrigated or improved for irrigation by private citizens who were neither Indians nor acting pursuant to authorization from or on behalf of the United States or the Indians, (2) a major portion of the disputed area lay within the boundaries of the Palo Verde Irrigation District, received water service through the facilities of the district,[2] and was then assessed by the Palo Verde Irrigation District pursuant to California law, some of them since 1927.[3]

As of 1990 the land ownership records of Riverside County, California for the lands within the disputed area show them as in private ownership, except for lands within the so-called "Olive Lake cutoff" area, to which title was quieted in the Tribes in 1983. SP Exs. 8, 9; Finding 19 *infra*.

17. The record in *Arizona* and in these proceedings contains no evidence that the Bureau of Indian Affairs or any other federal agency had ever asserted jurisdiction over the disputed area on behalf of the Colorado River Indian Tribes or that any claim of ownership of the lands in question had ever been made to the private oc-

[2] AI Tr. 14, 130-31A, 14, 055-57 (Rupkey); 20, 459 (Shipley).

[3] AI Calif. Ex. 3547; Tr. 20, 431-38, 20, 514 (Shipley).

cupants of those lands on behalf of the Tribes prior to the United States' claims in *Arizona I*, except for the Olive Lake cutoff area and a claim by the Commissioner of Indian Affairs in the Fall of 1877 which was rejected by the Secretary of the Interior, as detailed in Finding 15. SP Ex. 6; Tr. 318, 540-42.

18. The record in *Arizona I* shows that other federal administrative action in which the Bureau of Indian Affairs participated treated the Colorado River as the boundary in the disputed area and that the lands in the disputed area were not held in trust for the Colorado River Indian Tribes—namely: (a) the grant of a highway right-of-way through the disputed area to the State of California[4] and (b) the construction of Palo Verde Dam.[5]

19. The United States did not file exceptions to Master Rifkind's recommended findings and conclusions on the Colorado River Indian Reservation boundary dispute, (which fixed a riparian boundary), in *Arizona I*. In 1972 the United States instituted an action in the United States District Court for the Central District of California on behalf of the Colorado River Indian Tribes to quiet title to the lands in the Olive Lake "cutoff" area in California which Master Rifkind had found to be Reservation lands based on a change in the location of the Colorado River by avulsive action and which had been awarded a water right in the Supreme Court's 1964 decree in *Arizona I*. The Tribes subsequently intervened. The United States' pleadings were premised on an interpretation of the 1876

[4] AI Calif. Exs. 3543-43G; Tr. 20, 306-09; Rifkind Report at 276, n. 40.

[5] AI Calif. Exs. 361, 3535, 3536 (Tr. 20, 270-71), 3537, 3544 (Tr. 20, 309-13); Tr. 14, 131-32 (Rupkey), 20, 266-75 (Stetson); Rifkind Report at 276, n. 40.

Order as creating the west bank of the Colorado River as a boundary subject to the rules of erosion, accretion and avulsion, as was the Tribes' unsuccessful petition for certiorari to the Supreme Court for review of the Ninth Circuit's decision in *United States v. Aranson*, 696 F.2d 654, *cert. denied*, 464 U.S. 982 (1983). SP Exs. 12, 18.

20. The Executive Order of 1876, which is controlling in this dispute, established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not as a fixed line.

Dated: September 20, 1993

Frank J. McGarr
Special Master

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, ET AL.,

Defendants.

MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO INTERVENE AND BRIEF FOR THE WEST BANK HOMEOWNERS ASSOCIATION

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MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO INTERVENE

The West Bank Homeowners Association ("Association" or "occupants") is an unincorporated association representing approximately 650 families who live on a full or part time basis along a 17 mile stretch of the bank of the Colorado River in California in the area known in this case as the "disputed lands". These lands are the subject of a boundary dispute involving the Colorado River Indian Reservation ("Reservation") that is now pending in this Court before a Special Master. The Association fully satisfies the criteria of Fed. R. Civ. P. 24(a)(2) for intervention as a matter of right. Individually and collectively, and as members of the general public, they hereby move this Court for leave to intervene in this case as a matter of right and to file the accompanying brief. In support thereof, the Association states as follows:

I.

INTRODUCTION

The Colorado River Indian Reservation was established by the Act of March 3, 1865, 13 Stat. 541, 559, and for the following 104 years every federal agency, including the Bureau of Indian Affairs, treated the Colorado River as the western boundary in the disputed area. Sometime in the early 1960's a controversy arose within this case over the exact location of that boundary. Congress, by the Act of April 30, 1964, 78 Stat. 188, expressly prohibited the Secretary of the Interior from transferring control of the disputed lands, which were then in the public domain and under the administration of the

Bureau of Land Management, to the Reservation until "determined to be within the reservation." 78 Stat. 188, sec. 5.

The Secretary of the Interior and the officials under him unconstitutionally violated this statute (and certain other statutes as detailed in the brief annexed hereto) by issuing an *ex parte* ruling on January 17, 1969 purporting to determine the western boundary and thereafter transferred the disputed lands out of the public domain to the Bureau of Indian Affairs for the benefit of the Reservation. The Department of the Interior and other federal agencies have since forced the occupants of these lands to submit to the dominion and control of the Reservation in direct contravention of 78 Stat. 188, sec. 5.

The current case is before the Special Master to determine, *inter alia*, the location of the western boundary of the Reservation. The Association, if allowed by this Court to intervene, will file the accompanying brief to seek enforcement of Congress' clearly expressed intent to protect the integrity of the public lands in the disputed territory by seeking to restore to the public domain those lands determined to be outside the Reservation.

II.

THE ASSOCIATION IS A REAL PARTY IN INTEREST

The members of the West Bank Homeowners Association lawfully occupy the lands in the disputed area and many resided thereon long before the boundary claim was raised by the Colorado River Indian Reservation. They have invested substantial monies and labor in improving the properties and several members are retired

and living on fixed incomes and these homes are their only residences. Additionally, as members of the general public, they have a compelling interest in preserving access to what Congress expressly intended to remain public land and ensuring that income generated by activities thereon is tendered for the benefit of the United States.

III.

THE ASSOCIATION'S INTERVENTION IS JUSTIFIED TO PREVENT FURTHER IRREPARABLE HARM

Members of the Association and the general public are forced by the United States government to submit to the control of the Reservation. They have no legal rights or remedies whatsoever that are associated with federal laws pertaining to public lands. They must pay whatever fees the Reservation desires to access the land for leasing, hunting, fishing, camping, recreating, constructing buildings or conducting business thereon. Failure to remit the required fees to the Reservation exposes these persons to legal action through citation into a tribal court or, in the event of a lease dispute, eviction or trespass proceedings in the federal courts filed on behalf of the Colorado River Indian Tribes by the Department of Justice of the United States.

An Indian reservation is a sovereign nation under the law and as such it possesses sovereign immunity. When a party files suit against a reservation or attempts to raise an affirmative defense in an eviction proceeding to litigate the issue of whether the lands are in fact legally

established reservation lands, the United States successfully moves to dismiss the action based on lack of standing, the absence of indispensable parties (the reservation), and sovereign immunity. In *Metropolitan Water District v. United States*, Civ. No. 81-0678-GT(M) (Apr. 28, 1982), from which this case is derived, the United States stalled a trial on the merits of this boundary dispute until this Court granted the State Parties motion to reopen an earlier decree. *Arizona v. California*, 493 U.S. 886 (1989). The United States is currently employing this tactic with success in *Havasu Landing Homeowners Association, et al. v. Manual Lujan, Jr., et al.*, Civ. No. CV 92-6184-TJH (CTx) (Sept. 3, 1992). As a result, the principal issue of whether the Department of Interior legally empowered an Indian reservation to exercise control over the land is never judicially reviewed and resolved on the merits.

The occupants of the disputed lands are currently being threatened by representatives of various federal agencies and the Reservation with unlawful and unconstitutional efforts to terminate their rights by eviction if they do not continue to pay exorbitant lease rates. In light of the procedural blockade noted above, the occupants lack a legal avenue to protect their interests in an eviction proceeding by having the constitutional issues presented herein subjected to judicial review.

Under these unjust and unfair circumstances, the case at bar is the only forum in which the Association's claim can be heard. A disposition of this case in the absence of the Association will absolutely prevent it from protecting its compelling interest and that of the general public. Hence, it is submitted that the Association has a

direct stake in this controversy and intervention in this matter is justified to prevent further irreparable harm.

IV.

THE ASSOCIATION'S INTEREST IS INADEQUATELY REPRESENTED BY EXISTING PARTIES

Throughout the course of this action the representatives of the government have had the awkward and perhaps impossible task of fully representing the United States and its agencies while simultaneously honoring its responsibilities to the Indian tribes, whose interests in certain respects appear to be adverse to those of the United States and its agencies. Consequently, the responsible legal representatives of the United States are placed in an untenable position in attempting to adequately protect all of the differing interests. The Secretary of Interior's 1969 *ex parte* order created a conflict of interest for the government that it cannot now fairly dispose of. The government has failed in its fiduciary duty to uphold the laws established by Congress and to protect the interests of the public in safeguarding public lands.

The state parties are only interested in this action in so far as it relates to the amount of water the various parties are entitled to withdraw from the Colorado River. This reservation boundary dispute concerns them because the final determination of the boundary establishes the amount of irrigable acreage that is the basis for the calculation of water quantities. None of the parties to the action have submitted a claim to protect the public interest in these lands and restore them to the public domain if determined to be outside the Reservation.

Therefore, it is clear that the existing parties to the action inadequately represent the interest of the Association and the general public. Intervention by the Association will allow full exposition of the issues related to a final boundary determination.

V.

INTERVENTION IN A PENDING ORIGINAL ACTION BY PRIVATE INDIVIDUALS AND ORGANIZATIONS IS PERMISSIBLE

With respect to cases already pending, this Court has allowed certain persons to participate in the proceedings in order to protect their interests, regardless of whether they were parties or intervenors below. In *United States v. Terminal Railroad Association*, 236 U.S. 194, 199 (1915), the Court allowed certain parties, who had been denied intervention below, to intervene in pending appeals before the Court "to ask a modification of the decree" insofar as it operated prejudicially to their rights. In *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952), the Court granted a motion to add two new party plaintiffs after the merits of the case were before the Court to "remove this matter from controversy" after finding that the addition would in no way "embarrass the defendant" and would avoid the "needless waste" of having to start the case over again in the lower courts. Also, in *Labor Board v. Acme Industrial Co.*, 384 U.S. 925 (1966), 385 U.S. 432 (1967), the Court permitted a union, which had not participated in the judicial review proceedings in the court of appeals below, to intervene as a party before the Supreme Court and to file a brief in support of its interests in the labor controversy.

Intervention in original actions before the Court by private individuals and organizations is not unusual. In *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981), the Court approved the intervention of 17 pipeline companies because the direct imposition on them of the challenged state tax gave them "a direct stake in this controversy" and would lead to "a full exposition of the issues" involved; in this context, the Court stated "that it is not unusual to permit intervention of private parties in original actions." *Ibid.* In a previous ruling in this case, the Court permitted five Indian tribes to intervene. *Arizona v. California*, 460 U.S. 605 (1983). Also, in *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922), the Court allowed numerous private parties to intervene to assert rights to portions of land in dispute between two states.

VI.

INTERVENTION WILL NOT UNDULY BURDEN THE CURRENT PROCEEDINGS AND IS NOT UNTIMELY

Intervention by the Association will not unduly burden the Court since the Special Master has made a finding as to the proper location of the boundary and the proceedings are at a stage where the parties are briefing issues ancillary to a final boundary ruling. It is appropriate and in the interest of justice to present for contemporary consideration by this Court the issues presented herein which are now ripe for adjudication to ensure the final decree does not operate prejudicially to the rights of the Association and the public.

This Motion to Intervene is being submitted to the Court because representatives of the United States government, through agencies such as the Department of Interior, the Department of Justice, and the Bureau of Indian Affairs, and representatives of the Colorado River Indian Reservation, have recently informed the occupants of the disputed lands that a final decree in this case will not result in transfer of control and management of the lands to a different federal agency and will not restore the lands to the public domain. They maintain that there is nothing in the current proceedings to actively force the United States government to order such a transfer regardless of the nature of the final decree. Therefore, the Association has acted as soon as possible to file this motion to assert its claims.

WHEREFORE, the West Bank Homeowners Association, individually and collectively, and as members of the general public, respectfully prays that this Court grant their Motion for Leave to Intervene and allow them to file the brief annexed to this Motion.

Respectfully submitted,

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No. 8, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, ET AL.,

Defendants.

BRIEF FOR THE WEST BANK HOMEOWNERS ASSOCIATION IN INTERVENTION

QUESTION PRESENTED

Whether certain Acts of Congress require the Department of Interior to restore to the public domain those lands determined to be outside the Colorado River Indian Reservation.

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STATEMENT OF THE CASE

In 1952 this Court exercised the original jurisdiction vested in it under Article III, Section 2 of the United States Constitution to entertain this suit. After preliminary pleadings were filed, the Court referred this case to a Special Master, who filed his report with the Court on January 16, 1961, at 364 U.S. 940 (1961). On June 3, 1963, the Court rendered its opinion in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*"), and on March 9, 1964, the Court entered a corresponding Decree (hereafter referred to as the "Decree"), 376 U.S. 340 (1964), which was amended on February 28, 1966, 383 U.S. 268 (1966).

Although the Court then determined the principal issues involved in the suit, it reserved ruling upon several related questions. The Court provided procedures for future determination of those unresolved issues in Article II(D)(5), Article VI and Article IX of the Decree.

At the time the Court entered the Decree, there were known boundary disputes involving the Colorado River Indian Reservation and one other reservation. Recognizing that these reservations would be entitled to additional diversions from the Colorado River upon favorable final determinations of those disputes, the Court expressly provided in Article II(D)(5) of the Decree that the quantities of adjudicated water to which each of those tribes may be entitled "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." *Arizona v. California*, 376 U.S. at 345.

The Secretary of the Interior, without prior notice to the parties involved in this case, issued an *ex parte* ruling

on January 17, 1969 purporting to finally determine the western boundary of the Colorado River Indian Reservation. Thereafter the disputed lands, which were in the public domain and being administered by the Bureau of Land Management, were transferred out of the public domain to the Bureau of Indian Affairs for the benefit of the Reservation.

This Court determined in 1982 that " . . . we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations'. . . . " *Arizona v. California*, 460 U.S. 605, at 636 (1983). On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree in *Arizona I*. On October 10, 1989 the Court issued the following order:

> The motion of the State Parties to reopen decree to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Reservations is granted. Justice Marshall took no part in the consideration of this motion. *Arizona v. California*, 493 U.S. 886 (1989).

The Court then referred the matter to Special Master McGarr. The Special Master conducted a trial on the merits and issued his findings of fact and conclusions of law in Memorandum Opinion and Order No. 14 on September 20, 1993. The Special Master determined that the western boundary of the Colorado River Indian Reservation in the disputed territory is "where the water and the land meet, subject, as it must be, to the rules of erosion, accretion and avulsion." Special Master's Order No. 14 at page 10. This final boundary determination contradicts

the Secretary's 1969 *ex parte* ruling and places the disputed lands outside the Reservation.

ARGUMENT

THE SECRETARY OF INTERIOR ACTED ILLEGALLY AND UNCONSTITUTIONALLY IN ISSUING THE 1969 EX PARTE RULING AND TRANSFERRING THE LANDS OUT OF THE PUBLIC DOMAIN

The Secretary of Interior's 1969 *ex parte* ruling and subsequent transfer of the disputed lands out of the public domain was illegal and void as it violated the United States Constitution, Art. IV, Sec. 3, cl. 2, which grants only Congress the authority to dispose of federal property. Placing these public lands under control of the Reservation, which is a sovereign nation, without congressional approval is a disposition of federal property in violation of this constitutional provision.

The Secretary's ruling was also illegal in that it violated other statutes clearly establishing Congress' authority in dealing with Indian reservation lands and boundaries. The Act of June 30, 1919, now 43 U.S.C. Sec. 150, specifically states "Hereafter [after June 30, 1919] no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress." Congress also exercises exclusive control over reservation boundaries by the Act of March 3, 1927, now 25 U.S.C. Sec. 398d, which states "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be

made except by Act of Congress." These Acts of Congress demonstrate that the Secretary of Interior does not have the statutory authority to add *any* lands to a reservation or alter a reservation boundary without an act of Congress.

Furthermore, the Secretary's ruling was a direct violation of a congressional act specifically established to protect the lands in the disputed territory in the case at bar. By the Act of April 30, 1964, 78 Stat. 188, Congress established beneficial ownership of real property interests of the Reservation in the Colorado River Indian Tribes and it authorized the Secretary of the Interior to approve leases of lands on the Reservation. However, it expressly denied the Secretary authority to take *any* lands in the disputed territory:

> *Provided, however,* That the authorization herein granted to the Secretary of the Interior shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of the township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the Colorado River Reservation: *Provided further,* That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation." 78 Stat. 188, Sec. 5.

The Court of Appeals recognized "Congress' constitutional power over the proper administration and disposition of the public lands is without limitation" and "[o]nce Congress has acted in that regard, both the courts and the executive agencies have no choice but to follow

strictly the dictates of such statutes." *Kidd v. United States Department of Interior, Bureau of Land Management,* 756 F.2d 1410, 1411 (CA9 1985). Officials in executive agencies "are without that power, save only as it has been conferred upon them by Act of Congress. . . . " *Royal Indemnity Co. v. United States,* 313 U.S. 289, 294 (1941).

The Secretary of Interior's 1969 order, issued when there was ongoing litigation in this case to which it was a party, without notice to the other parties in that litigation and an opportunity to be heard, without authorization by Congress, and in direct defiance of Congress's expressed prohibition against taking *any* land in the disputed area for the benefit of the reservation until the boundary was finally determined, was nothing more than an illegal ploy by the Executive branch to usurp the authority of Congress with the stroke of a pen and attempt to influence the outcome of this boundary dispute.

As was so aptly stated by this Court in *Confederated Bands of the Indians v. United States,* in holding that an 1880 act moving the Utes from the Colorado reservation did not incorporate an agreement to convert the reservation from an executive order reservation to a congressionally enacted reservation so as to entitle the Indians to compensation "[We] cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts to make them mean something they obviously were not intended to mean. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so." 330 U.S. 169, 179 (1947).

CONCLUSION

The established constitutional grant of authority to Congress in this area and statutory provisions noted above support the conclusion that the Secretary acted without any authority whatsoever and his 1969 order was unconstitutional and illegal and is void as a matter of law. Therefore, none of the lands in the disputed territory are, or ever were, reservation lands held in trust by the Federal government for the Colorado River Indians or any other Indians and the Association is entitled to a declaratory judgment to that effect.

The Secretary of Interior, and all federal officials acting under him, and all other federal officials acting on his behalf or on behalf of the Colorado River Indian Reservation, are unlawfully neglecting and failing to carry out their official duties with respect to the administration of public lands by continuing to treat said lands as reservation lands. The Association is entitled to relief in the nature of mandamus against said federal government officials ordering and directing them to cease attempting to administer the lands in question as if the lands were held in trust for the Colorado River Indian Reservation, and, instead, mandating that they, and those acting through or under them, administer the lands as public lands under all applicable public land laws.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

(TEXAS BOUNDARY CASE)

ON BILL OF COMPLAINT

JOINT MOTION FOR ENTRY OF A SUPPLEMENTAL DECREE, MEMORANDUM IN SUPPORT OF JOINT MOTION FOR A SUPPLEMENTAL DECREE, AND PROPOSED SUPPLEMENTAL DECREE

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JOINT MOTION FOR ENTRY OF A SUPPLEMENTAL DECREE

The United States of America and the State of Texas jointly move that this Court enter a supplemental decree in the form and manner of the attached proposed decree. The basis for this motion is explained in the memorandum that follows.

Respectfully submitted.

DAN MORALES
Attorney General
State of Texas

SETH P. WAXMAN
Solicitor General

SEPTEMBER 1998

In the Supreme Court of the United States

OCTOBER TERM, 1997

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(TEXAS BOUNDARY CASE)

ON BILL OF COMPLAINT

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR A SUPPLEMENTAL DECREE

This joint motion arises from past litigation between the United States and the State of Texas to resolve the seaward boundary of that State for purposes of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* The Submerged Lands Act provides that the coastal States shall be entitled to a prescribed measure of submerged lands extending seaward from their respective coastlines. As a result of the previous litigation, the Court entered a decree describing the federal-state boundary as an ambulatory line that may move in response to changes in the coastline. *United States* v. *Louisiana* (*Texas Boundary*

Case) 394 U.S. 836 (1969). The parties ask this Court to enter a supplemental decree immobilizing the federal-state boundary on the basis of fixed coordinates.

1. Congress enacted the Submerged Lands Act in response to a series of decisions of this Court holding that the States have no entitlement under the Equal Footing Doctrine to submerged lands seaward of their coastlines. *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *California*, 332 U.S. 19 (1947). Following the enactment of the Submerged Lands Act, the United States filed suit against Louisiana to determine the extent of that State's statutory entitlement to submerged lands in the Gulf of Mexico. See *United States* v. *Louisiana*, 350 U.S. 990 (1956). The United States and the States of Alabama, Florida, Mississippi, and Texas later expanded the litigation to encompass the States' Submerged Lands Act rights along the entire Gulf Coast. See *United States* v. *Louisiana*, 354 U.S. 515 (1957) (per curiam).

The United States moved for judgment on the pleadings, and the Court issued two opinions, ruling that the Submerged Lands Act grants Alabama, Mississippi, and Louisiana submerged lands within three geographic miles of their coastlines, *United States* v. *Louisiana*, 363 U.S. 1, 83 (1960), that the Act grants Texas submerged lands within three marine leagues of its coastline, *id.* at 84, and that the Act grants Florida submerged lands within three marine leagues of its coastline along the Gulf of Mexico, *United States* v. *Florida*, 363 U.S. 121 (1960). The Court entered a final decree to that effect. *United States* v. *Louisiana*, 364 U.S. 502 (1960).

Thereafter, the United States sought to reopen the case to determine, among other things, specific issues regarding the location of Texas's seaward boundary. See *United States* v. *Louisiana*, 386 U.S. 979 (1967); see also *United States* v. *Louisiana*, 386 U.S. 1016 (1967). This Court ultimately ruled that Texas's three marine league grant should be measured from the "historical boundary" of Texas as it existed in 1845, when Texas was admitted to the Union, and does not include subsequent artificial additions, such as jetties. *United States* v. *Louisiana*, 389 U.S. 155, 156 (1967). The Court later determined, however, that Section 2(b) of the Submerged Lands Act, 43 U.S.C. 1301(b), limits the maximum extent of Texas's grant to three marine leagues seaward from the current coastline. *United States* v. *Louisiana* (*Texas Boundary Case*), 394 U.S. 1 (1969).

Under the Court's rulings, Texas is entitled to submerged lands within three marine leagues of its 1845 coastline, except where the coastline has receded from its 1845 location. In the latter places, Texas is entitled to the submerged lands within three marine leagues of the current ambulatory coastline. The United States and Texas jointly submitted, and this Court approved on May 5, 1969, a supplemental decree describing the 1845 coastline and defining an ambulatory federal-state boundary on the basis of those principles. *Texas Boundary Case*, 394 U.S. 836.

2. As Texas has noted, an ambulatory federal-state boundary can present practical difficulties for a State's offshore mineral leasing program because erosion of the coastline may affect the State's title to the leased territory near the federal-state boundary. See, *e.g.*, *Texas Boundary Case*, 394 U.S. at 5-6. The Court acknowledged that possibility, but pointed out

that the potential problems arise from the terms of the Submerged Lands Act and that "Texas must look to Congress for relief." *Id.* at 6. Congress has responded to the problem by amending the Submerged Lands Act to provide:

> Any boundary between a State and the United States under this Act which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory.

Outer Continental Shelf Lands Act Amendments of 1985, Pub. L. No. 99-272, Tit. VIII, § 8005, 100 Stat. 151, codified at 43 U.S.C. 1301(b). That legislation allows the United States and coastal States to fix federal-state boundaries in appropriate cases and thereby promote certainty and fairness, not only with respect to mineral leasing, but with respect to other sovereign interests as well.

In accordance with the legislation, the United States and Texas have reached an agreement on a specification of fixed coordinates for the federal-state boundary in the area offshore of Texas. They have determined the federal-state boundary by: (1) identifying the 1845 Texas coastline and the current Texas coastline; (2) projecting lines three marine leagues seaward from each of those coastlines; and (3) constructing a composite line using the more landward points of those two lines. The result is a single line, mutually acceptable to the United States and Texas and consistent with Section 2(b) of the Submerged Lands Act, 43 U.S.C. 1301(b), for demarcating the submerged lands rights of the parties. The attached proposed decree sets out the coordinates of that line.

The United States and Texas tender that proposed decree for entry by this Court.

If the Court enters the proposed decree, it would fix the coordinates of the federal-state boundary between the United States and Texas and, in that respect, supersede the boundary description set out in the Court's supplemental decree of May 5, 1969. See *Texas Boundary Case*, 394 U.S. 836. The Court has previously entered other decrees that establish a fixed federal-state boundary in the Gulf of Mexico by specifying the coordinates of the federal-state boundary or the coastline from which the Submerged Lands Act grant is measured. See *United States* v. *Louisiana (Alabama and Mississippi Boundary Case)*, 507 U.S. 7 (1993) (Alabama coastline); *Mississippi* v. *United States*, 498 U.S. 16 (1990) (stipulated baseline in the vicinity of Chandeleur Sound); *United States* v. *Louisiana (Alabama and Mississippi Boundary Case)*, 498 U.S. 9 (1990) (Mississippi coastline in the vicinity of Mississippi Sound); *United States* v. *Louisiana* (*Louisiana Boundary Case*) 452 U.S. 726 (1981) (United States-Louisiana boundary); *United States* v. *Louisiana* (*Louisiana Boundary Case*), 422 U.S. 13 (1975) (Louisiana coastline). If the Court enters the proposed decree, the decrees in combination would provide a continuous and fixed federal-state boundary in the Gulf of Mexico from the United States' and the State of Texas's border with the Republic of Mexico to the State of Alabama's border with the State of Florida. See App., *infra*, 32a (map showing the location of the fixed federal-state

boundary established by the proposed and existing decrees).*

For the forgoing reasons, the Court should enter the proposed supplemental decree.

Respectfully submitted.

DAN MORALES
Attorney General
State of Texas

SETH P. WAXMAN
Solicitor General

SEPTEMBER 1998

* The United States is continuing to work with the State of Florida to develop a fixed federal-state boundary on the Gulf Coast portion of that State. Compare *United States* v. *Florida*, 425 U.S. 791 (1976) (decree describing an ambulatory federal-state boundary).

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ON BILL OF COMPLAINT

PROPOSED SUPPLEMENTAL DECREE

On December 12, 1960, this Court entered a final decree addressing the entitlement of the United States and the States of Alabama, Florida, Louisiana, Mississippi, and Texas to lands, minerals, and other natural resources underlying the Gulf of Mexico. *United States* v. *Louisiana*, 364 U.S. 502 (1960). On May 5, 1969, this Court entered a supplemental decree describing the 1845 coastline of the State of Texas and the offshore boundary between the United States and Texas. *United States* v. *Louisiana (Texas Boundary Case)*, 394 U.S. 836 (1969). For the purpose of identifying with greater particularity the boundary line between the submerged lands of Texas

and those of the United States, it is ordered, adjudged, and decreed as follows:

1. As against the United States, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313, the State of Texas is entitled to all lands, minerals, and other natural resources underlying the Gulf of Mexico, bounded on the south by the international boundary with the Republic of Mexico and on the east by the boundary between the States of Texas and Louisiana and an extension thereof, that lie landward of the line described in paragraph 3 below.

2. As against the State of Texas, the United States is entitled to all lands, minerals, and other natural resources underlying the Gulf of Mexico, bounded on the south by the international boundary with the Republic of Mexico and on the east by the boundary between the States of Texas and Louisiana and an extension thereof, that lie seaward of the line described in paragraph 3 below.

3. The federal-state boundary line, referred to in paragraphs 1 and 2 above, is located as follows:

	NAD 27 TEXAS SOUTH ZONE (FEET)	
TYPE CODE	x-coordinate	y-coordinate
BEGINNING AT	2499640.190	113383.050
BY STRAIGHT LINE TO	2499530.550	116379.990
BY ARC CENTERED AT	2444923.280	113478.030
TO	2499085.770	121013.970
BY STRAIGHT LINE TO	2498580.340	124646.260
BY ARC CENTERED AT	2444417.930	117110.640
TO	2498520.860	125062.040

BY ARC CENTERED AT	2447716.990	104830.000
TO	2498147.430	125977.510
BY STRAIGHT LINE TO	2498068.220	126760.310
BY ARC CENTERED AT	2443661.000	121256.010
TO	2497382.910	131473.560
BY STRAIGHT LINE TO	2497076.470	135705.480
BY STRAIGHT LINE TO	2497119.050	137947.290
BY STRAIGHT LINE TO	2497240.260	139652.480
BY ARC CENTERED AT	2442693.000	143530.000
TO	2496941.950	150421.250
BY STRAIGHT LINE TO	2496722.950	152145.250
BY ARC CENTERED AT	2442474.000	145254.000
TO	2496369.790	154510.440
BY STRAIGHT LINE TO	2495552.790	159267.440
BY ARC CENTERED AT	2441657.000	150011.000
TO	2495160.620	161315.920
BY STRAIGHT LINE TO	2494874.980	162667.810
BY STRAIGHT LINE TO	2494746.000	163636.000
BY STRAIGHT LINE TO	2494468.310	165973.870
BY ARC CENTERED AT	2443246.710	146822.120
TO	2492810.740	169927.290
BY STRAIGHT LINE TO	2492774.800	170112.970
BY ARC CENTERED AT	2439086.150	159722.250
TO	2492588.170	171034.890
BY STRAIGHT LINE TO	2492205.260	174407.590
BY ARC CENTERED AT	2437625.640	171015.450
TO	2491921.560	177526.340
BY STRAIGHT LINE TO	2491552.740	180602.020
BY ARC CENTERED AT	2437256.820	174091.130
TO	2491382.170	181893.990
BY STRAIGHT LINE TO	2491322.660	182306.820
BY STRAIGHT LINE TO	2491250.280	183423.780
BY ARC CENTERED AT	2436679.820	179887.780
TO	2491038.940	185848.050
BY STRAIGHT LINE TO	2490687.070	189057.190

BY ARC CENTERED AT	2436327.950	183096.920
TO	2490568.140	190056.800
BY STRAIGHT LINE TO	2489781.810	196184.910
BY STRAIGHT LINE TO	2489408.130	199725.490
BY ARC CENTERED AT	2435025.270	193985.870
TO	2488891.700	203411.710
BY STRAIGHT LINE TO	2488385.320	206305.540
BY STRAIGHT LINE TO	2488095.190	207985.200
BY STRAIGHT LINE TO	2487772.010	210387.930
BY ARC CENTERED AT	2433575.160	203098.250
TO	2487561.760	211809.440
BY STRAIGHT LINE TO	2487232.820	213848.020
BY ARC CENTERED AT	2432844.590	208159.240
TO	2487027.760	215549.950
BY STRAIGHT LINE TO	2486636.220	218420.430
BY ARC CENTERED AT	2432453.050	211029.720
TO	2486214.950	221034.530
BY STRAIGHT LINE TO	2485938.220	222521.570
BY STRAIGHT LINE TO	2485815.850	223411.880
BY ARC CENTERED AT	2431640.280	215965.660
TO	2484763.880	228939.650
BY STRAIGHT LINE TO	2484753.860	228995.960
BY ARC CENTERED AT	2430915.120	219413.240
TO	2484707.670	229251.920
BY STRAIGHT LINE TO	2484141.990	232344.750
BY ARC CENTERED AT	2430349.440	222506.070
TO	2483210.720	236510.600
BY STRAIGHT LINE TO	2483055.890	237300.960
BY ARC CENTERED AT	2429390.990	226788.270
TO	2482686.770	239035.640
BY STRAIGHT LINE TO	2482267.080	240861.990
BY STRAIGHT LINE TO	2481855.260	242883.000
BY ARC CENTERED AT	2428271.470	231964.400
TO	2481793.420	243182.190
BY STRAIGHT LINE TO	2481027.530	246836.380

BY ARC CENTERED AT	2427505.580	235618.590
TO	2480357.520	249658.190
BY STRAIGHT LINE TO	2480292.310	249903.680
BY ARC CENTERED AT	2426833.570	238388.260
TO	2479639.120	252601.340
BY STRAIGHT LINE TO	2478059.020	258471.870
BY STRAIGHT LINE TO	2477392.310	261606.470
BY ARC CENTERED AT	2423903.880	250229.900
TO	2476815.070	264044.520
BY STRAIGHT LINE TO	2474580.490	272603.140
BY STRAIGHT LINE TO	2473051.430	278464.090
BY STRAIGHT LINE TO	2472865.110	279221.610
BY ARC CENTERED AT	2419762.850	266160.680
TO	2472134.540	281897.390
BY STRAIGHT LINE TO	2471635.750	283557.370
BY STRAIGHT LINE TO	2471536.110	284004.850
BY ARC CENTERED AT	2418158.400	272119.650
TO	2470645.240	287467.950
BY STRAIGHT LINE TO	2469160.610	292544.980
BY ARC CENTERED AT	2415708.630	280998.210
TO	2468375.640	295716.380
BY STRAIGHT LINE TO	2467281.750	299630.710
BY STRAIGHT LINE TO	2467063.940	300479.790
BY ARC CENTERED AT	2414094.150	286891.590
TO	2466681.490	301891.910
BY STRAIGHT LINE TO	2464286.370	310288.600
BY ARC CENTERED AT	2411699.030	295288.280
TO	2463285.380	313434.620
BY STRAIGHT LINE TO	2461034.980	320839.800
BY ARC CENTERED AT	2408712.780	304939.300
TO	2460234.640	323267.860
BY STRAIGHT LINE TO	2459053.490	326588.090
BY ARC CENTERED AT	2407531.630	308259.530
TO	2458585.720	327853.430
BY ARC CENTERED AT	2406144.130	312351.150

TO	2458085.170	329455.830
BY ARC CENTERED AT	2405329.070	315060.150
TO	2456893.510	333268.570
BY STRAIGHT LINE TO	2456601.800	334094.660
BY ARC CENTERED AT	2402327.560	327405.250
TO	2456491.030	334939.170
BY STRAIGHT LINE TO	2450926.200	352123.960
BY ARC CENTERED AT	2398901.000	335277.000
TO	2450600.010	353099.830
BY ARC CENTERED AT	2402327.560	327405.250
TO	2448841.400	356161.200
BY ARC CENTERED AT	2397154.960	338301.920
TO	2448402.460	357384.260
BY STRAIGHT LINE TO	2448203.960	358041.630
BY ARC CENTERED AT	2395853.580	342234.170
TO	2447351.610	360629.590
BY STRAIGHT LINE TO	2445237.930	366546.830
BY STRAIGHT LINE TO	2444812.700	367941.320
BY ARC CENTERED AT	2392505.710	351990.870
TO	2444593.900	368641.950
BY STRAIGHT LINE TO	2443105.010	373299.520
BY ARC CENTERED AT	2391016.820	356648.440
TO	2442033.710	376339.020
BY ARC CENTERED AT	2389552.290	360972.090
TO	2441418.680	378301.810
BY STRAIGHT LINE TO	2441344.850	378626.700
BY ARC CENTERED AT	2388019.490	366508.780
TO	2439779.110	384154.840
BY STRAIGHT LINE TO	2439562.270	385005.700
BY ARC CENTERED AT	2386571.100	371501.090
TO	2438943.520	387235.390
BY STRAIGHT LINE TO	2437602.910	391697.680
BY ARC CENTERED AT	2385230.490	375963.380
TO	2437284.850	392719.940
BY STRAIGHT LINE TO	2436975.360	393681.380

BY STRAIGHT LINE TO	2436280.090	396142.280
BY STRAIGHT LINE TO	2435935.420	397450.420
BY ARC CENTERED AT	2383055.220	383517.610
TO	2435869.020	397700.130
BY ARC CENTERED AT	2382474.620	385889.990
TO	2434395.970	403054.240
BY STRAIGHT LINE TO	2433650.070	405310.550
BY STRAIGHT LINE TO	2433087.580	407425.790
BY ARC CENTERED AT	2380239.370	393372.130
TO	2432993.510	407774.870
BY STRAIGHT LINE TO	2432437.610	409811.000
BY STRAIGHT LINE TO	2432335.870	410202.980
BY ARC CENTERED AT	2379404.950	396464.120
TO	2432157.640	410872.290
BY ARC CENTERED AT	2378627.400	399693.960
TO	2431651.370	413069.200
BY STRAIGHT LINE TO	2431453.470	413853.740
BY STRAIGHT LINE TO	2431013.370	415825.730
BY ARC CENTERED AT	2377641.480	403914.410
TO	2430848.050	416543.720
BY STRAIGHT LINE TO	2430456.820	418191.950
BY ARC CENTERED AT	2377250.250	405562.640
TO	2430081.080	419681.490
BY STRAIGHT LINE TO	2429782.280	420799.550
BY ARC CENTERED AT	2376492.690	408525.150
TO	2429618.410	421490.340
BY STRAIGHT LINE TO	2429425.410	422281.170
BY ARC CENTERED AT	2376299.690	409315.980
TO	2429115.820	423489.710
BY STRAIGHT LINE TO	2428995.000	423939.930
BY STRAIGHT LINE TO	2428815.500	424717.220
BY ARC CENTERED AT	2375532.880	412412.700
TO	2428479.360	426091.600
BY STRAIGHT LINE TO	2428280.980	427102.420
BY ARC CENTERED AT	2374619.700	416571.290

TO	2427686.310	429776.450
BY STRAIGHT LINE TO	2427221.210	432117.020
BY ARC CENTERED AT	2373585.020	421458.800
TO	2426956.130	433373.750
BY STRAIGHT LINE TO	2426718.550	434664.430
BY ARC CENTERED AT	2372937.210	424764.650
TO	2426443.020	436059.350
BY ARC CENTERED AT	2372724.710	425822.890
TO	2425824.030	438895.890
BY STRAIGHT LINE TO	2425299.740	441472.100
BY ARC CENTERED AT	2371166.980	433720.610
TO	2424769.480	444547.000
BY STRAIGHT LINE TO	2424185.850	447436.620
BY STRAIGHT LINE TO	2424127.670	447874.140
BY ARC CENTERED AT	2369919.910	440666.050
TO	2423862.830	449643.980
BY ARC CENTERED AT	2369485.630	443850.710
TO	2423405.660	452964.920
BY STRAIGHT LINE TO	2422577.640	457863.520
BY ARC CENTERED AT	2368657.610	448749.310
TO	2422499.930	458312.070
BY STRAIGHT LINE TO	2422242.120	460576.560
BY ARC CENTERED AT	2367908.210	454390.750
TO	2422182.660	461078.510
BY ARC CENTERED AT	2367641.220	457119.550
TO	2422138.650	461644.150
BY STRAIGHT LINE TO	2422077.650	462326.940
BY ARC CENTERED AT	2367641.220	457119.550
TO	2421804.280	464656.200
BY STRAIGHT LINE TO	2421763.410	464949.880
BY ARC CENTERED AT	2367204.320	461242.220
TO	2421206.650	469855.550
BY STRAIGHT LINE TO	2421192.970	469999.840
BY STRAIGHT LINE TO	2421148.590	470607.900
BY ARC CENTERED AT	2366608.740	466627.610

TO	2421002.790	472260.180
BY STRAIGHT LINE TO	2420625.570	475903.050
BY STRAIGHT LINE TO	2420474.600	477959.400
BY STRAIGHT LINE TO	2420464.560	478299.760
BY ARC CENTERED AT	2365803.390	476688.020
TO	2420421.760	479385.270
BY STRAIGHT LINE TO	2420325.690	480908.060
BY STRAIGHT LINE TO	2420303.780	481206.590
BY ARC CENTERED AT	2365634.650	479892.280
TO	2420301.800	481286.650
BY STRAIGHT LINE TO	2419964.790	486628.350
BY STRAIGHT LINE TO	2419807.600	488421.100
BY STRAIGHT LINE TO	2419815.100	489050.630
BY ARC CENTERED AT	2365134.050	489702.030
TO	2419817.350	489279.390
BY STRAIGHT LINE TO	2419592.920	493821.700
BY STRAIGHT LINE TO	2419588.860	494734.230
BY STRAIGHT LINE TO	2419586.170	494766.260
BY STRAIGHT LINE TO	2419523.860	497706.230
BY STRAIGHT LINE TO	2419529.920	501346.460
BY STRAIGHT LINE TO	2419441.950	506501.720
BY STRAIGHT LINE TO	2419749.610	514044.990
BY STRAIGHT LINE TO	2419872.320	516348.740
BY STRAIGHT LINE TO	2419879.340	516771.410
BY STRAIGHT LINE TO	2419941.610	518160.240
BY ARC CENTERED AT	2365564.350	523952.890
TO	2420046.380	519246.550
BY STRAIGHT LINE TO	2420164.830	521008.880
BY ARC CENTERED AT	2365603.000	524676.000
TO	2420189.460	521395.780
BY ARC CENTERED AT	2365564.350	523952.890
TO	2420249.280	523965.170
BY STRAIGHT LINE TO	2420314.570	524835.970
BY ARC CENTERED AT	2366101.610	532005.080
TO	2420323.670	524905.110

BY STRAIGHT LINE TO	2420366.920	526247.710
BY STRAIGHT LINE TO	2421336.030	538405.930
BY ARC CENTERED AT	2366824.000	542751.000
TO	2421428.630	539788.670
BY STRAIGHT LINE TO	2421449.160	540167.060
BY STRAIGHT LINE TO	2421590.660	540985.590
BY ARC CENTERED AT	2367705.000	550301.000
TO	2421629.070	541210.570
BY ARC CENTERED AT	2367242.130	546911.620
TO	2421712.320	542070.190
BY STRAIGHT LINE TO	2421873.460	543188.510
BY ARC CENTERED AT	2367747.500	550987.350
TO	2422133.700	545279.250
BY STRAIGHT LINE TO	2422164.040	545456.340
BY ARC CENTERED AT	2368264.240	554689.590
TO	2422202.260	545682.270
BY STRAIGHT LINE TO	2422522.100	548828.020
BY STRAIGHT LINE TO	2422758.260	550124.120
BY ARC CENTERED AT	2368264.240	554689.590
TO	2422789.160	550509.280
BY STRAIGHT LINE TO	2422844.930	550845.260
BY ARC CENTERED AT	2368898.240	559800.470
TO	2422912.170	551260.190
BY ARC CENTERED AT	2369352.490	562296.570
TO	2423047.950	551940.930
BY STRAIGHT LINE TO	2423261.620	553048.840
BY STRAIGHT LINE TO	2423600.420	555115.010
BY STRAIGHT LINE TO	2424692.350	560776.670
BY ARC CENTERED AT	2370786.300	569973.380
TO	2424763.300	561202.680
BY STRAIGHT LINE TO	2424936.150	562266.460
BY ARC CENTERED AT	2371804.880	575209.000
TO	2425189.960	563356.800
BY STRAIGHT LINE TO	2425603.330	565500.130
BY STRAIGHT LINE TO	2425719.410	566062.140

BY ARC CENTERED AT	2371804.880	575209.000
TO	2425970.990	567694.050
BY ARC CENTERED AT	2372891.700	580848.170
TO	2426476.550	569934.620
BY STRAIGHT LINE TO	2426759.750	571094.040
BY ARC CENTERED AT	2373636.620	584069.970
TO	2427001.620	572127.690
BY STRAIGHT LINE TO	2427068.030	572424.430
BY ARC CENTERED AT	2374312.620	586822.650
TO	2428075.200	576821.310
BY STRAIGHT LINE TO	2428113.770	577028.640
BY ARC CENTERED AT	2375731.900	592731.550
TO	2429540.890	582983.010
BY STRAIGHT LINE TO	2429922.920	584415.650
BY ARC CENTERED AT	2377084.350	598505.620
TO	2430569.690	587114.410
BY ARC CENTERED AT	2377692.260	601057.820
TO	2430741.360	587782.480
BY STRAIGHT LINE TO	2431599.780	590546.360
BY ARC CENTERED AT	2379375.720	606766.390
TO	2432118.430	592321.740
BY STRAIGHT LINE TO	2432320.820	593060.740
BY ARC CENTERED AT	2379578.110	607505.390
TO	2432613.420	594175.070
BY ARC CENTERED AT	2380766.020	611561.520
TO	2433949.830	598836.580
BY STRAIGHT LINE TO	2434474.510	600505.210
BY ARC CENTERED AT	2382307.710	616908.460
TO	2434941.410	602071.520
BY STRAIGHT LINE TO	2435346.570	603508.820
BY ARC CENTERED AT	2384049.050	622456.270
TO	2436335.810	606439.530
BY STRAIGHT LINE TO	2436562.320	607178.960
BY ARC CENTERED AT	2385120.810	625731.940
TO	2436838.740	607964.060

BY STRAIGHT LINE TO	2437860.380	611265.290
BY STRAIGHT LINE TO	2440773.250	619882.130
BY STRAIGHT LINE TO	2443621.860	627687.240
BY STRAIGHT LINE TO	2446144.590	633614.600
BY STRAIGHT LINE TO	2449255.470	641224.720
BY STRAIGHT LINE TO	2451943.700	647349.180
BY ARC CENTERED AT	2403216.710	672170.980
TO	2453839.050	651487.170
BY STRAIGHT LINE TO	2454354.520	652748.750
BY ARC CENTERED AT	2404751.450	675769.980
TO	2455233.950	654747.150
BY STRAIGHT LINE TO	2456428.610	657615.910
BY STRAIGHT LINE TO	2457409.770	659715.620
BY STRAIGHT LINE TO	2457492.800	659881.530
BY STRAIGHT LINE TO	2457880.700	660588.980
BY ARC CENTERED AT	2409930.560	686880.150
TO	2459681.540	664180.340
BY ARC CENTERED AT	2410622.500	688339.230
TO	2460486.730	665889.290
BY STRAIGHT LINE TO	2461860.990	668941.700
BY ARC CENTERED AT	2411996.760	691391.640
TO	2462119.470	669524.870
BY ARC CENTERED AT	2412857.140	693266.490
TO	2463355.690	672282.250
BY ARC CENTERED AT	2414870.770	697573.640
TO	2466048.730	678305.590
BY STRAIGHT LINE TO	2466166.030	678617.150
BY STRAIGHT LINE TO	2467162.470	680797.150
BY ARC CENTERED AT	2417426.790	703530.470
TO	2467494.230	681537.440
BY STRAIGHT LINE TO	2469260.580	685558.560
BY ARC CENTERED AT	2419193.140	707551.590
TO	2470435.270	688454.830
BY STRAIGHT LINE TO	2471688.830	691818.490
BY STRAIGHT LINE TO	2471885.230	692323.690

BY STRAIGHT LINE TO	2472205.200	692969.770
BY ARC CENTERED AT	2423200.660	717239.030
TO	2472310.610	693183.800
BY STRAIGHT LINE TO	2473617.860	695852.620
BY ARC CENTERED AT	2426284.340	723238.370
TO	2475216.930	698824.380
BY STRAIGHT LINE TO	2475401.770	699194.860
BY ARC CENTERED AT	2431965.410	732417.200
TO	2477193.450	701678.530
BY STRAIGHT LINE TO	2477226.150	701747.670
BY STRAIGHT LINE TO	2482144.440	710612.870
BY ARC CENTERED AT	2432146.070	732762.470
TO	2483702.310	714530.740
BY ARC CENTERED AT	2439420.060	746616.940
TO	2488071.690	721647.760
BY STRAIGHT LINE TO	2488180.360	721859.490
BY ARC CENTERED AT	2441291.670	750000.080
TO	2489005.570	723282.570
BY STRAIGHT LINE TO	2489076.160	723408.630
BY ARC CENTERED AT	2443300.190	753325.220
TO	2491593.620	727670.080
BY STRAIGHT LINE TO	2491955.580	728217.450
BY ARC CENTERED AT	2446341.710	758380.620
TO	2494300.900	732105.970
BY STRAIGHT LINE TO	2495840.520	734483.860
BY ARC CENTERED AT	2449937.320	764204.860
TO	2496595.180	735683.190
BY ARC CENTERED AT	2452452.610	767961.280
TO	2498869.230	739048.680
BY ARC CENTERED AT	2455279.690	772069.780
TO	2500456.130	741255.320
BY STRAIGHT LINE TO	2500712.690	741564.640
BY ARC CENTERED AT	2458621.980	776476.150
TO	2504252.800	746338.630
BY STRAIGHT LINE TO	2505354.910	748007.320

BY ARC CENTERED AT	2459724.090	778144.840
TO	2505590.820	748367.590
BY STRAIGHT LINE TO	2505983.500	748889.880
BY STRAIGHT LINE TO	2511490.700	757056.430
BY STRAIGHT LINE TO	2515271.770	762239.850
BY ARC CENTERED AT	2471092.000	794467.000
TO	2522659.430	776266.950
BY ARC CENTERED AT	2469699.060	789891.960
TO	2523181.540	778487.310
BY STRAIGHT LINE TO	2524130.650	780076.610
BY ARC CENTERED AT	2477180.560	808114.640
TO	2524616.270	780906.270
BY STRAIGHT LINE TO	2525688.370	782775.400
BY STRAIGHT LINE TO	2526405.610	783873.390
BY STRAIGHT LINE TO	2526912.250	784575.150
BY ARC CENTERED AT	2485221.810	819963.690
TO	2529566.360	787963.660
BY STRAIGHT LINE TO	2530120.660	788731.790
BY ARC CENTERED AT	2485776.110	820731.820
TO	2530599.690	789406.300
BY STRAIGHT LINE TO	2532693.510	792048.080
BY ARC CENTERED AT	2489837.050	826015.210
TO	2533104.660	792573.390

NAD 27
TEXAS SOUTH CENTRAL
ZONE (FEET)

TYPE CODE	x-coordinate	y-coordinate
BEGINNING AT	2694807.370	7920.000
BY ARC CENTERED AT	2651368.410	41138.940
TO	2695028.050	8210.570
BY STRAIGHT LINE TO	2696328.030	9934.210
BY ARC CENTERED AT	2652668.390	42862.580

TO	2697132.900	11029.450
BY STRAIGHT LINE TO	2697605.010	11688.900
BY STRAIGHT LINE TO	2698950.860	13543.300
BY STRAIGHT LINE TO	2699068.710	13696.800
BY ARC CENTERED AT	2655692.950	46998.220
TO	2699266.660	13956.230
BY STRAIGHT LINE TO	2700474.150	15548.600
BY STRAIGHT LINE TO	2701138.660	16356.020
BY ARC CENTERED AT	2658914.680	51106.230
TO	2703459.340	19385.340
BY STRAIGHT LINE TO	2704242.140	20343.120
BY STRAIGHT LINE TO	2706136.980	22576.320
BY ARC CENTERED AT	2664439.240	57956.260
TO	2707160.620	23819.400
BY STRAIGHT LINE TO	2707981.110	24846.220
BY ARC CENTERED AT	2668397.030	62576.080
TO	2711386.470	28777.420
BY ARC CENTERED AT	2672807.810	67534.720
TO	2712913.170	30359.440
BY STRAIGHT LINE TO	2714851.590	32807.340
BY STRAIGHT LINE TO	2720375.410	38908.640
BY STRAIGHT LINE TO	2724706.490	43579.770
BY STRAIGHT LINE TO	2727377.400	46418.300
BY ARC CENTERED AT	2691713.000	87873.000
TO	2728696.140	47590.380
BY STRAIGHT LINE TO	2729240.290	48143.360
BY ARC CENTERED AT	2690262.500	86499.240
TO	2731180.770	50220.650
BY STRAIGHT LINE TO	2732208.340	51122.910
BY ARC CENTERED AT	2691713.000	87873.000
TO	2733517.040	52618.730
BY STRAIGHT LINE TO	2745286.590	64044.590
BY STRAIGHT LINE TO	2759114.410	76841.960
BY STRAIGHT LINE TO	2760917.070	78431.750
BY STRAIGHT LINE TO	2775278.440	90137.930

BY STRAIGHT LINE TO	2780827.390	94573.040
BY ARC CENTERED AT	2746685.000	137290.000
TO	2782550.130	96008.850
BY STRAIGHT LINE TO	2783851.500	97139.490
BY STRAIGHT LINE TO	2791481.830	102793.450
BY STRAIGHT LINE TO	2800074.060	109136.540
BY STRAIGHT LINE TO	2807481.710	114229.980
BY STRAIGHT LINE TO	2814202.430	118282.770
BY ARC CENTERED AT	2785963.000	165112.000
TO	2815384.430	119016.220
BY STRAIGHT LINE TO	2824561.520	124873.660
BY STRAIGHT LINE TO	2831319.290	128676.100
BY STRAIGHT LINE TO	2836670.030	131276.120
BY STRAIGHT LINE TO	2839196.630	132253.910
BY ARC CENTERED AT	2819460.000	183253.000
TO	2840052.770	132593.560
BY STRAIGHT LINE TO	2843903.410	134158.820
BY STRAIGHT LINE TO	2844183.740	134312.590
BY STRAIGHT LINE TO	2844955.770	134703.330
BY STRAIGHT LINE TO	2845872.960	135155.240
BY ARC CENTERED AT	2825497.270	185902.390
TO	2849289.540	136664.510
BY STRAIGHT LINE TO	2851199.390	137587.370
BY ARC CENTERED AT	2827407.120	186825.250
TO	2856405.590	140462.220
BY STRAIGHT LINE TO	2858663.940	141874.740
BY ARC CENTERED AT	2829665.470	188237.770
TO	2863238.310	145071.740
BY STRAIGHT LINE TO	2864474.860	146033.480
BY ARC CENTERED AT	2830902.020	189199.510
TO	2869325.100	150287.970
BY STRAIGHT LINE TO	2871170.070	152109.780
BY ARC CENTERED AT	2832746.990	191021.320
TO	2873748.790	154837.150
BY STRAIGHT LINE TO	2874832.670	156065.340

BY ARC CENTERED AT	2833830.870	192249.510
TO	2876665.940	158255.420
BY ARC CENTERED AT	2835315.130	194040.220
TO	2884219.480	169569.700
BY STRAIGHT LINE TO	2885787.250	172702.890
BY ARC CENTERED AT	2836882.900	197173.410
TO	2887801.040	177228.870
BY ARC CENTERED AT	2861037.520	224916.980
TO	2892584.140	180213.460
BY ARC CENTERED AT	2843740.000	204903.000
TO	2893217.860	181613.880
BY STRAIGHT LINE TO	2899305.200	186971.240
BY STRAIGHT LINE TO	2899402.030	187052.190
BY STRAIGHT LINE TO	2902597.410	189375.210
BY ARC CENTERED AT	2861037.520	224916.980
TO	2903033.110	189891.110
BY STRAIGHT LINE TO	2904106.160	190615.100
BY ARC CENTERED AT	2873520.570	235946.800
TO	2905080.870	191288.220
BY STRAIGHT LINE TO	2906715.280	192443.260
BY STRAIGHT LINE TO	2907638.010	193039.690
BY STRAIGHT LINE TO	2908291.270	193514.600
BY STRAIGHT LINE TO	2909528.920	194309.070
BY STRAIGHT LINE TO	2913234.320	196854.940
BY ARC CENTERED AT	2882266.880	241926.650
TO	2913575.440	197091.220
BY STRAIGHT LINE TO	2916494.860	199129.850
BY ARC CENTERED AT	2885186.300	243965.280
TO	2917722.370	200012.520
BY STRAIGHT LINE TO	2921608.890	202889.520
BY ARC CENTERED AT	2889072.820	246842.280
TO	2922355.840	203452.390
BY STRAIGHT LINE TO	2924874.060	204954.900
BY STRAIGHT LINE TO	2925427.680	205261.000
BY ARC CENTERED AT	2898967.370	253118.010

TO	2926410.500	205817.730
BY STRAIGHT LINE TO	2929730.690	207744.070
BY ARC CENTERED AT	2902287.560	255044.350
TO	2929788.430	207777.620
BY STRAIGHT LINE TO	2933284.200	209811.540
BY STRAIGHT LINE TO	2935512.090	211057.520
BY STRAIGHT LINE TO	2938136.100	212469.450
BY ARC CENTERED AT	2912224.160	260625.580
TO	2940025.910	213535.190
BY STRAIGHT LINE TO	2941803.060	214584.410
BY STRAIGHT LINE TO	2945705.860	216708.220
BY ARC CENTERED AT	2919567.150	264741.640
TO	2945971.370	216853.660
BY STRAIGHT LINE TO	2950356.990	219271.780
BY ARC CENTERED AT	2923952.770	267159.760
TO	2952750.810	220671.970
BY STRAIGHT LINE TO	2952941.730	220766.740
BY ARC CENTERED AT	2928628.000	269749.230
TO	2954636.540	221645.200
BY STRAIGHT LINE TO	2955570.580	222150.210
BY ARC CENTERED AT	2929562.040	270254.240
TO	2956349.210	222579.420
BY STRAIGHT LINE TO	2958574.420	223829.710
BY ARC CENTERED AT	2934873.920	273111.830
TO	2960692.460	224905.560
BY STRAIGHT LINE TO	2963431.970	226372.800
BY STRAIGHT LINE TO	2965204.970	227236.970
BY ARC CENTERED AT	2941245.650	276393.790
TO	2967432.070	228386.360
BY ARC CENTERED AT	2945032.090	278273.060
TO	2971422.390	230377.410
BY STRAIGHT LINE TO	2972631.480	231043.620
BY STRAIGHT LINE TO	2973791.840	231637.530
BY STRAIGHT LINE TO	2974855.500	232126.290
BY STRAIGHT LINE TO	2975886.050	232563.650

BY ARC CENTERED AT	2954522.400	282902.860
TO	2979713.960	234366.000
BY STRAIGHT LINE TO	2981251.110	235163.810
BY ARC CENTERED AT	2962694.900	286604.150
TO	2983148.800	235888.480
BY STRAIGHT LINE TO	2985123.210	236684.770
BY ARC CENTERED AT	2964669.310	287400.440
TO	2987350.630	237641.030
BY STRAIGHT LINE TO	2989974.540	238837.060
BY ARC CENTERED AT	2967293.220	288596.470
TO	2991504.860	239563.440
BY STRAIGHT LINE TO	2992692.050	240149.650
BY STRAIGHT LINE TO	2994157.460	240845.210
BY ARC CENTERED AT	2970708.630	290247.580
TO	2996836.490	242208.260
BY ARC CENTERED AT	2975121.040	292396.710
TO	2998927.060	243165.470
BY STRAIGHT LINE TO	3001943.270	244623.970
BY STRAIGHT LINE TO	3005992.320	246501.780
BY STRAIGHT LINE TO	3006383.000	246669.180
BY ARC CENTERED AT	2984845.740	296934.360
TO	3010364.330	248568.640
BY STRAIGHT LINE TO	3012157.230	249514.600
BY STRAIGHT LINE TO	3012669.720	249751.240
BY STRAIGHT LINE TO	3015766.180	251135.710
BY ARC CENTERED AT	2993445.230	301057.820
TO	3018223.300	252308.580
BY STRAIGHT LINE TO	3020665.560	253549.920
BY STRAIGHT LINE TO	3023218.950	254739.210
BY ARC CENTERED AT	3000130.070	304310.830
TO	3025066.900	255642.610
BY STRAIGHT LINE TO	3027348.820	256811.830
BY ARC CENTERED AT	3002411.990	305480.050
TO	3028551.970	257447.320
BY STRAIGHT LINE TO	3032126.990	259392.890

BY STRAIGHT LINE TO	3034886.150	260872.740
BY ARC CENTERED AT	3011486.350	310298.350
TO	3036787.320	261818.430
BY STRAIGHT LINE TO	3040213.090	263606.290
BY ARC CENTERED AT	3014912.120	312086.210
TO	3042854.470	265079.120
BY STRAIGHT LINE TO	3043391.400	265398.290
BY STRAIGHT LINE TO	3044340.600	265915.800
BY STRAIGHT LINE TO	3045260.030	266396.740
BY ARC CENTERED AT	3019913.320	314852.760
TO	3050465.910	269498.810
BY STRAIGHT LINE TO	3050938.340	269775.110
BY ARC CENTERED AT	3023330.840	316979.640
TO	3052959.320	271016.670
BY STRAIGHT LINE TO	3053570.440	271410.610
BY STRAIGHT LINE TO	3054073.930	271681.910
BY ARC CENTERED AT	3028133.560	319822.730
TO	3055171.330	272289.580
BY STRAIGHT LINE TO	3056933.050	273291.680
BY ARC CENTERED AT	3029895.280	320824.830
TO	3057177.250	273431.420
BY STRAIGHT LINE TO	3059433.260	274730.090
BY ARC CENTERED AT	3032151.290	322123.500
TO	3062556.130	276670.370
BY STRAIGHT LINE TO	3062977.270	276952.080
BY ARC CENTERED AT	3036185.280	324624.200
TO	3064898.830	278084.180
BY STRAIGHT LINE TO	3067021.350	279393.700
BY ARC CENTERED AT	3038307.800	325933.720
TO	3069004.830	280677.400
BY STRAIGHT LINE TO	3069637.340	281067.730
BY ARC CENTERED AT	3043468.560	329084.770
TO	3073035.950	283082.470
BY STRAIGHT LINE TO	3074010.760	283709.020
BY STRAIGHT LINE TO	3075822.560	284817.110

BY ARC CENTERED AT	3047290.570	331468.660
TO	3078656.890	286673.620
BY STRAIGHT LINE TO	3079619.950	287347.970
BY ARC CENTERED AT	3049567.270	333034.710
TO	3079702.580	287402.430
BY STRAIGHT LINE TO	3082003.660	288922.050
BY ARC CENTERED AT	3054525.300	336201.870
TO	3085421.450	291081.260
BY STRAIGHT LINE TO	3088773.840	293376.800
BY STRAIGHT LINE TO	3090741.410	294610.440
BY ARC CENTERED AT	3061692.160	340941.670
TO	3092340.220	295652.180
BY STRAIGHT LINE TO	3094116.700	296854.350
BY ARC CENTERED AT	3063468.640	342143.840
TO	3095040.470	297493.410
BY STRAIGHT LINE TO	3095430.140	297768.940
BY STRAIGHT LINE TO	3096912.310	298585.120
BY ARC CENTERED AT	3070534.190	346487.480
TO	3098138.840	299281.290
BY STRAIGHT LINE TO	3100464.140	300641.050
BY ARC CENTERED AT	3072859.490	347847.240
TO	3101787.990	301440.520
BY ARC CENTERED AT	3076027.690	349677.940
TO	3104438.060	302952.230
BY STRAIGHT LINE TO	3106979.340	304497.390
BY ARC CENTERED AT	3078568.970	351223.100
TO	3108249.870	305293.960
BY STRAIGHT LINE TO	3109812.630	306303.870
BY STRAIGHT LINE TO	3110194.100	306530.950
BY ARC CENTERED AT	3085475.680	355310.470
TO	3112099.850	307544.430
BY STRAIGHT LINE TO	3113786.380	308484.480
BY ARC CENTERED AT	3087162.210	356250.520
TO	3116712.170	310237.030
BY STRAIGHT LINE TO	3117589.020	310800.150

BY STRAIGHT LINE TO	3118082.780	311090.820
BY ARC CENTERED AT	3090340.260	358216.120
TO	3118621.310	311412.020
BY STRAIGHT LINE TO	3121372.570	313074.450
BY ARC CENTERED AT	3093091.520	359878.550
TO	3123784.330	314619.370
BY STRAIGHT LINE TO	3125238.200	315605.320
BY ARC CENTERED AT	3096351.420	362038.020
TO	3127470.950	317071.180
BY ARC CENTERED AT	3098829.320	363655.500
TO	3128388.830	317648.140
BY STRAIGHT LINE TO	3130157.030	318784.200
BY ARC CENTERED AT	3100597.520	364791.560
TO	3133615.320	321199.510
BY STRAIGHT LINE TO	3134125.290	321585.770
BY STRAIGHT LINE TO	3134198.270	321637.080
BY STRAIGHT LINE TO	3135152.370	322234.400
BY ARC CENTERED AT	3106134.000	368584.970
TO	3136413.270	323048.090
BY ARC CENTERED AT	3112530.430	372242.110
TO	3143150.490	326933.680
BY STRAIGHT LINE TO	3147344.680	329768.170
BY STRAIGHT LINE TO	3151130.960	332331.990
BY ARC CENTERED AT	3120469.880	377612.660
TO	3151869.500	332840.960
BY STRAIGHT LINE TO	3154262.980	334519.580
BY STRAIGHT LINE TO	3154408.100	334609.950
BY ARC CENTERED AT	3125499.620	381029.140
TO	3156953.120	336295.270
BY STRAIGHT LINE TO	3157670.040	336799.350
BY STRAIGHT LINE TO	3159482.250	337125.970
BY ARC CENTERED AT	3149782.580	390943.790
TO	3160057.260	337232.780
BY STRAIGHT LINE TO	3168664.390	342866.180
BY ARC CENTERED AT	3138717.000	388622.000

TO	3172530.430	345644.170
BY STRAIGHT LINE TO	3177771.360	349048.780
BY ARC CENTERED AT	3147981.000	394907.000
TO	3178426.110	349480.830
BY STRAIGHT LINE TO	3184351.110	353451.830
BY ARC CENTERED AT	3153906.000	398878.000
TO	3185298.270	354101.140
BY STRAIGHT LINE TO	3196291.270	361808.140
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TO	3197099.170	362385.560
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BY STRAIGHT LINE TO	3205263.990	368189.780
BY ARC CENTERED AT	3182950.000	418115.000
TO	3213258.850	372597.800
BY STRAIGHT LINE TO	3214102.850	373159.800
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TO	3230735.560	390624.700
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TO	3235623.940	395734.230
BY STRAIGHT LINE TO	3235703.680	395823.380
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BY STRAIGHT LINE TO	3237447.590	397632.950
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TO	3239992.950	399817.040
BY STRAIGHT LINE TO	3243250.850	402790.780
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TO	3243687.070	403193.310
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BY ARC CENTERED AT	3209175.210	445664.140
TO	3244505.920	403924.680
BY STRAIGHT LINE TO	3247383.500	406360.430
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BY ARC CENTERED AT	3215528.190	451000.440
TO	3251544.470	409851.090
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TO	3284820.550	439600.280
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TO	3288053.370	445124.430
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BY STRAIGHT LINE TO	3293012.610	449248.210
BY ARC CENTERED AT	3258390.270	491577.100
TO	3293509.770	449659.770
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BY ARC CENTERED AT	3267019.120	498356.660
TO	3300771.900	455331.180
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BY STRAIGHT LINE TO	3306387.000	459641.100
BY STRAIGHT LINE TO	3315159.420	466351.910
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TO	3337137.810	482153.660
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TO	3338662.180	483352.150
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TO	3339969.760	484320.380
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BY STRAIGHT LINE TO	3342310.160	485999.640
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TO	3344961.070	487885.870
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TO	3346381.780	488891.230
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BY ARC CENTERED AT	3317324.660	535296.490
TO	3348789.000	490570.250
BY STRAIGHT LINE TO	3352514.640	493191.190
BY ARC CENTERED AT	3321050.300	537917.430
TO	3353540.970	493931.100
BY STRAIGHT LINE TO	3356490.310	496109.640
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BY STRAIGHT LINE TO	3358658.460	497656.240
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BY ARC CENTERED AT	3331276.600	544993.740
TO	3363039.620	500479.110
BY STRAIGHT LINE TO	3364052.810	501202.060
BY STRAIGHT LINE TO	3365123.820	501931.140
BY ARC CENTERED AT	3334351.130	547136.040
TO	3367637.520	503748.740
BY ARC CENTERED AT	3337714.340	549520.400
TO	3368482.930	504312.710
BY STRAIGHT LINE TO	3369268.290	504847.230
BY ARC CENTERED AT	3338499.700	550054.920

TO	3369800.950	505214.390
BY STRAIGHT LINE TO	3372559.410	507272.000
BY ARC CENTERED AT	3338499.700	550054.920
TO	3373614.500	508133.660
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TO	3377774.640	511659.850
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TO	3384860.870	518401.660
BY STRAIGHT LINE TO	3385537.490	519146.670
BY STRAIGHT LINE TO	3386633.810	520042.560
BY STRAIGHT LINE TO	3388591.970	521628.810
BY ARC CENTERED AT	3347926.000	558190.000
TO	3393315.840	527690.750
BY STRAIGHT LINE TO	3394122.840	528891.750
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TO	3399047.490	537969.190
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TO	3401544.000	544379.250
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TO	3404498.140	556395.490
BY STRAIGHT LINE TO	3404679.220	557757.790
BY STRAIGHT LINE TO	3405302.700	558362.900
BY STRAIGHT LINE TO	3407136.430	559951.320
BY STRAIGHT LINE TO	3409313.420	561569.860
BY STRAIGHT LINE TO	3413751.663	564517.350
BY STRAIGHT LINE TO	3416817.303	566362.990
BY ARC CENTERED AT	3362234.900	569710.060
TO	3416828.504	566550.958
BY STRAIGHT LINE TO	3418699.836	567713.079
BY STRAIGHT LINE TO	3421382.821	569170.219
BY ARC CENTERED AT	3395283.920	617225.280

TO	3423152.926	570174.668
BY STRAIGHT LINE TO	3425613.944	571632.378
BY STRAIGHT LINE TO	3428804.780	573341.880
BY STRAIGHT LINE TO	3432075.460	575071.310
BY STRAIGHT LINE TO	3437335.520	577761.390
BY ARC CENTERED AT	3412435.990	626448.710
TO	3437610.350	577902.930
BY STRAIGHT LINE TO	3439337.100	578798.370
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TO	3440728.600	579545.650
BY STRAIGHT LINE TO	3443235.460	580938.940
BY STRAIGHT LINE TO	3445418.780	582040.680
BY STRAIGHT LINE TO	3447864.630	583212.770
BY STRAIGHT LINE TO	3450072.100	584201.860
BY ARC CENTERED AT	3427711.710	634106.320
TO	3453214.910	585732.480
BY STRAIGHT LINE TO	3454433.220	586374.790
BY STRAIGHT LINE TO	3455501.290	586908.130
BY ARC CENTERED AT	3431070.770	635832.470
TO	3458042.990	588262.090
BY STRAIGHT LINE TO	3458389.230	588458.400
BY ARC CENTERED AT	3435900.240	638305.040
TO	3461841.100	590164.480
BY STRAIGHT LINE TO	3462462.880	590465.590
BY ARC CENTERED AT	3438628.430	639683.070
TO	3463035.280	590746.920
BY ARC CENTERED AT	3441833.750	641154.620
TO	3465438.840	591826.720
BY STRAIGHT LINE TO	3468650.230	593363.480
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TO	3469131.740	593596.800
BY STRAIGHT LINE TO	3471228.450	594625.480
BY ARC CENTERED AT	3447141.850	643720.060
TO	3471362.930	594691.690
BY STRAIGHT LINE TO	3474132.030	596059.680

BY STRAIGHT LINE TO	3475825.280	596817.210
BY ARC CENTERED AT	3453493.380	646734.420
TO	3476645.540	597192.330
BY ARC CENTERED AT	3456899.830	648187.900
TO	3482481.740	599855.640
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BY ARC CENTERED AT	3462205.110	650686.730
TO	3484641.120	600816.230
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BY ARC CENTERED AT	3464086.300	651533.050
TO	3487016.090	601887.640
BY STRAIGHT LINE TO	3491235.290	603836.370
BY STRAIGHT LINE TO	3496213.220	606059.140
BY ARC CENTERED AT	3473916.830	655992.220
TO	3497951.440	606872.170
BY STRAIGHT LINE TO	3498685.120	607231.160
BY STRAIGHT LINE TO	3503806.050	609655.650
BY STRAIGHT LINE TO	3508779.890	611990.260
BY ARC CENTERED AT	3485544.270	661493.260
TO	3511159.360	613178.580
BY STRAIGHT LINE TO	3511659.620	613443.800
BY STRAIGHT LINE TO	3512941.260	614091.050
BY STRAIGHT LINE TO	3515304.430	615170.310
BY ARC CENTERED AT	3492586.860	664913.190
TO	3516475.520	615722.000
BY STRAIGHT LINE TO	3518706.360	616805.360
BY ARC CENTERED AT	3494817.700	665996.550
TO	3520121.670	617518.200
BY STRAIGHT LINE TO	3521945.880	618470.370
BY STRAIGHT LINE TO	3526935.900	620807.280
BY ARC CENTERED AT	3503743.370	670330.490
TO	3528200.310	621419.350
BY STRAIGHT LINE TO	3530772.900	622705.720
BY STRAIGHT LINE TO	3533312.180	623738.220
BY ARC CENTERED AT	3512714.270	674395.570

TO	3536696.410	625249.880
BY STRAIGHT LINE TO	3539974.040	626849.300
BY ARC CENTERED AT	3515991.900	675994.990
TO	3540926.870	627325.810
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BY ARC CENTERED AT	3519696.950	677893.220
TO	3545186.710	629512.300
BY STRAIGHT LINE TO	3548475.960	631245.260
BY ARC CENTERED AT	3522986.200	679626.180
TO	3550505.660	632370.270
BY STRAIGHT LINE TO	3550910.210	632605.860
BY STRAIGHT LINE TO	3552928.580	633669.390
BY STRAIGHT LINE TO	3556148.900	635089.470
BY ARC CENTERED AT	3534084.260	685125.390
TO	3558249.890	636069.670
BY STRAIGHT LINE TO	3560691.670	637272.530
BY ARC CENTERED AT	3536526.040	686328.250
TO	3562430.730	638168.220
BY STRAIGHT LINE TO	3565992.450	640084.020
BY STRAIGHT LINE TO	3566333.520	640255.940
BY STRAIGHT LINE TO	3567170.390	640628.420
BY STRAIGHT LINE TO	3568719.440	641309.230
BY ARC CENTERED AT	3546716.500	691372.310
TO	3571167.010	642457.960
BY STRAIGHT LINE TO	3574070.960	643909.540
BY STRAIGHT LINE TO	3576192.050	644899.490
BY STRAIGHT LINE TO	3578268.450	645805.500
BY ARC CENTERED AT	3556398.640	695926.880
TO	3578815.310	646047.680
BY STRAIGHT LINE TO	3579057.520	646156.530
BY STRAIGHT LINE TO	3579114.000	646175.640
BY ARC CENTERED AT	3561590.160	697976.770
TO	3585716.140	648901.530
BY STRAIGHT LINE TO	3586220.680	649095.240
BY ARC CENTERED AT	3566620.680	700146.990

TO	3587589.120	649641.880
BY ARC CENTERED AT	3570958.340	701736.590
TO	3588990.640	650110.260
BY STRAIGHT LINE TO	3590333.400	650579.270
BY ARC CENTERED AT	3579572.410	704194.960
TO	3593415.640	651291.210
BY STRAIGHT LINE TO	3593591.250	651337.160
BY STRAIGHT LINE TO	3594647.370	651526.190
BY STRAIGHT LINE TO	3595223.860	651628.040
BY ARC CENTERED AT	3599949.780	706108.380
TO	3601283.300	651439.710
BY STRAIGHT LINE TO	3602145.680	651460.750
BY ARC CENTERED AT	3603850.670	706119.090
TO	3604799.560	651442.390
BY ARC CENTERED AT	3608144.610	706024.920
TO	3605182.710	651420.260
BY STRAIGHT LINE TO	3606653.510	651340.480
BY ARC CENTERED AT	3609615.410	705945.140
TO	3607866.960	651288.170
BY STRAIGHT LINE TO	3609190.540	651245.830
BY ARC CENTERED AT	3613363.750	705771.290
TO	3611677.920	651112.350
BY ARC CENTERED AT	3623588.450	704484.450
TO	3621803.630	649828.650
BY STRAIGHT LINE TO	3622808.970	649795.820
BY ARC CENTERED AT	3624593.790	704451.620
TO	3622868.200	649793.920
BY STRAIGHT LINE TO	3623427.560	649776.260
BY STRAIGHT LINE TO	3628660.560	649850.580
BY ARC CENTERED AT	3627884.000	704530.000
TO	3632507.720	650040.890
BY STRAIGHT LINE TO	3634970.720	650249.890
BY ARC CENTERED AT	3630347.000	704739.000
TO	3651367.500	654255.540
BY STRAIGHT LINE TO	3653430.500	655114.540

BY ARC CENTERED AT	3632410.000	705598.000
TO	3654596.266	655615.891

4. Plane coordinates refer to the Texas Coordinate Systems, South Zone or South Central Zone, as indicated. All coordinates are referenced to the North American Datum of 1927.

5. The Court retains jurisdiction to entertain such further proceedings, to enter such orders, and to issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree, or to effectuate the rights of the parties.

Non-Ambulatory Federal/State Boundaries in the Gulf of Mexico

Legend

——— **Federal/State Boundary fixed by prior Supreme Court Decrees**

····· **Proposed US/Texas Boundary**

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(9)

No. 8, Original

In the

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Before The Special Master – Frank J. McGarr

REPORT AND RECOMMENDATION

July 28, 1999

15 pp

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I. Introduction

On October 10, 1989, the United States Supreme Court granted the motion of the States of Arizona and California to reopen the decree in *Arizona v. California, No. 8 Original* to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations, 493 US 886 (1989).

I was appointed as Special Master to hear the parties and to make recommendations to the Court. Since that time, the matter has been the subject of a series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues.

Prior to the completion of the case by hearings on the allocation of water rights flowing from the earlier decisions, extensive negotiations on water rights resulted in a Settlement Agreement submitted for review by the Special Master with a motion seeking a recommendation of approval to the Supreme Court.

There are two motions to approve settlement agreements, together with memoranda in support thereof, and the Agreement and proposed decree to effectuate it.

The first is the joint motion relating to the Fort Mojave Reservation. The second is a similar motion, memorandum, agreement and proposed decree which resolves the issues concerning the Colorado River Reservation.

This case arises out of the historic Colorado River decision in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*") and its aftermath, *Arizona v. California*, 460 U. S. 605 (1983) (hereafter "*Arizona II*"). It was initiated in 1989 by the States of California and Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley Water District ("State Parties") to obtain a final determination of two Indian reservation boundary disputes left unresolved in *Arizona I* (Fort Mojave and Colorado River) and one which was presented but not resolved in *Arizona II* (Fort Yuma (Quechan), so that the reservations' water rights could be finally established in order to facilitate critical water planning in the lower Colorado River Basin.

In *Arizona I*, five Indian reservations along the lower Colorado River (Fort Mojave, Colorado River, Chemehuevi, Cocopah and Fort Yuma) were awarded water rights necessary to satisfy "the future as well as the present needs of the Indian Reservations" in accordance with *Winters v. United States*, 207 U.S. 564 (1908). *Arizona I* at 600. The Indians' needs were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Id.* at 600-01.

California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and

Fort Mojave reservations were actually within their boundaries. The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who generally rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes," *Id.* At 601, and its 1964 Decree provided for "appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 344.

In 1969 and 1974, the Secretary of the Interior issued orders determining the boundaries of the Colorado River and Fort Mojave reservations, respectively. In 1978, the Secretary also issued an order determining the Fort Yuma (Quechan) Reservation boundary.

In 1978, the United States filed a petition to reopen *Arizona I* and , *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the disputed boundary areas. The Special Master appointed to hear those claims, Elbert P. Tuttle, declined to consider the merits of the Secretary's orders, concluding that they constituted "final determinations" of the boundaries within the meaning of the 1964 Decree. *Arizona II* at 634-35. He conducted a trial solely on the issue of the practicable irritability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet of diversions annually. Metropolitan and Coachella thereupon sought resolution of the

three boundary disputes in the United States District Court for the Southern District of California.

This Court subsequently rejected Special Master Tuttle's recommendations and directed the State Parties to pursue the district court action, *Arizona II* at 636, 638, which they did. After the district court voided the Secretary's 1974 Fort Mojave boundary determination and held that a *de novo* trial as to the proper boundary was appropriate, *Metropolitan Water District of Southern California v. United States*, 628 F. Supp. 1018 (S.D. Cal 1986), the Ninth Circuit granted the United States and the Fort Mojave Tribe an interlocutory appeal and held that the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a, did not authorize the State Parties' action and ordered the district court to dismiss the case for lack of jurisdiction. *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987). This Court granted *certiorari* and the Ninth Circuit's decision was affirmed by an equally divided Court *sub nom California v. United States*, 490 U. S. 920 (1989).

On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree:

> "[in] order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations."

> "The State Parties also request the Court (1) to determine whether the United States' claim for additional water for the Fort Yuma Indian Reservation resulting from a 1978 redetermination of the boundary of that reservation and asserted in *Arizona v. California*, 460U.S.605(1983) ("*Arizona II*"),is precluded by the doctrine of *res judicata* and (2) if not, to determine the proper boundary of that reservation and the amount and priority of additional water rights, if any, to which the reservation may be entitled.Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims."

The United States and the Tribes did not oppose the State Parties' motion and the Court granted it on October 10, 1989. 493 U.S. 886 (1989).

On November 17, 1989, Robert B . McKay, Professor Emeritus at New York University School of Law, was appointed Special Master to conduct the reopened proceedings. 493 U.S. 970. Following his death in 1990, the undersigned was appointed to succeed him on November 13, 1990. 498 U. S. 964. Since that time, the matter has been the subject of a

series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues. The central issue in the case was decided in Order No. 14 dated September 20, 1993, which held that the western boundary of the Colorado River Indian Reservation was a riparian boundary.

The proceedings before the Special Master have resulted in twenty-two substantive memorandum opinions and/or procedural orders, which are summarized in Appendix 1 to this Report. The texts of all of them, as well as the transcript of various meetings and the trial of the Colorado River Indian Reservation boundary dispute, are included in the record of these proceedings which accompany this Report.

At an initial meeting with the parties on February 26, 1991, the Special Master was informed that they had agreed in principle to settlement of the Fort Mojave boundary dispute. It was also agreed that certain preliminary issues should be resolved before addressing the merits of the boundary disputes on the Colorado River and Fort Yuma (Quechan) Indian reservations, including whether the United States and the Quechan Tribe were precluded from asserting their claims.

II. The Fort Yuma (Quechan) Indian Reservation Dispute

This dispute involves approximately 25,000 acres of land in the vicinity of the Fort Yuma (Quechan) Indian Reservation in California and Arizona, and the question of whether these disputed boundary lands are part of that reservation and therefore entitled to a consequent increase in the water rights allocated to the reservation by the 1964 Decree in *Arizona I*. No claim had been made for those lands by the United States in

Arizona I because there was a 1936 Interior Department Solicitor's Opinion (the "Margold Opinion") to the effect that the disputed lands were not part of the reservation. Apparently, the Margold Opinion was considered a controlling determination by the United States that the disputed lands were not part of the reservation. The Margold Opinion was affirmed by subsequent Solicitors in 1968 and 1977. Later in 1977, Secretary of the Interior Andrus directed his Solicitor to review the issue once again. On December 29, 1978, Solicitor Krulitz issued an opinion concluding that an 1893 Agreement between the United States and the Quechan Tribe purporting to cede certain tribal lands to the United States was invalid because the United States had not honored a number of conditions in the Agreement. Secretary Andrus then issued an order approving the Krulitz Opinion and including the disputed boundary lands within the Reservation.

In *Arizona II*, Special Master Tuttle had proposed an additional allocation of 78,519 AF of diversions for the disputed boundary lands, which, as noted above, the Court rejected on the grounds that the boundary had not been "finally determined" within the meaning of the 1964 Decree. The United States and the Quechan Tribe were prepared to make the same claim in these proceedings, but the State Parties objected that they were precluded from doing so by having failed to assert their claim in *Arizona I* and, alternatively, by virtue of a final judgment by the Court of Claims in 1983 approving a settlement awarding the Tribe $15 million in a suit filed against the United States in 1951 for the alleged taking of the disputed boundary lands pursuant to the 1893 Agreement. Following extensive briefing of this issue, I rendered Memorandum Opinion and Order No. 4 on September 6, 1991,

which rejected the State Parties' first argument but accepted their second based on the 1983 Court of claims judgment. This holding precluded the Quechan Tribe from asserting their claims in this case. Motions by the United States and the Tribe for reconsideration of that decision were denied by Orders Nos. 5 and 7 of January 20, 1992 and May 15, 1992, respectively. A renewed motion by the Tribe for reconsideration was denied by Order No. 13 of April 13, 1993. Those orders are set forth in Appendices 2 A-D to this Report.

III. The Fort Mojave Indian Reservation Dispute

The Fort Mojave Reservation dispute involved the question of the proper location of the western boundary of a portion of the Reservation in California known as the Hay and Wood Reserve. At issue were some 3350 acres of land with annual water requirements of approximately 12,087 acre feet. After extensive negotiations, the United States, the Fort Mojave Indian Tribe, the States of California and Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley District entered into a Stipulation and Agreement and a supporting memorandum which are attached as Appendix 3.

The settlement (1) agrees on the location of the disputed boundary, (2) disclaims any intent to determine title to and jurisdiction over the bed of the last natural course of the Colorado River within the agreed upon boundaries and preserves the claims and arguments of California and Arizona, on the one hand, and the United States and the Fort Mojave Tribe, on the other, and (3) awards the Tribe the lesser of an additional 3,022 acre-feet of water diversions or enough water to supply the requirements of 468 acres, (4)

precludes future claims by the United States or the Tribe for additional Colorado River water for existing trust or allotted lands within the Hay and Wood portion of the Reservation in California and (5) disclaims any intent to affect any claims to or jurisdiction over any lands.

IV. The Colorado River Indian Reservation Dispute

The Colorado River Reservation dispute involved claims for water rights related to certain lands affected by the proper location of a portion of the western boundary of the Reservation in California. Following denial of the California and Arizona motion for summary judgment on the issue and subsequent trial of the dispute as to the boundary, I rendered a series of opinions on the location of the boundary. Those opinions concluded that the disputed boundary was a riparian boundary along the west bank of the Colorado River, not its mid-channel (Orders Nos. 14 and 16), and that it was not affected by California Civil Code 830 (Order No. 18).

The State of California, the United States, the Colorado River Indian Tribes, The Metropolitan Water District of Southern California and the Coachella Valley Water District subsequently entered into extensive negotiations and later executed a Stipulation and Agreement dated February 23, 1999, settling all water rights disputes associated with the disputed boundary, but, unlike the Fort Mojave settlement, did not resolve the boundary dispute itself. That Stipulation and Agreement and a supporting memorandum are attached as Appendix 4.

The settlement (1) awards the Tribe the lesser of an additional 2100 acre-feet of diversions or enough water to irrigate 315

acres of land, (2) precludes future claims by the Tribes and/or the United States on their behalf for any additional reserved water rights from the Colorado River for lands in California, (3) embodies an agreement not to seek adjudication in these proceedings of the correct location of the disputed boundary, (4) preserves the claims and arguments of California, on the one hand, and the United States and the Tribes, on the other, with regard to title to and jurisdiction over the bed of the Colorado River within the Reservation, (4) precludes reliance by any of the settlement parties on the Special Master's several opinions on the boundary issues in any future boundary litigation among the parties, and (5) provides that it shall only become effective upon the Special Master's unqualified recommendation to the Court for its approval, the court's unqualified approval of the Special Master's Report in this regard, and the issuance of an appropriate decree reflecting approval of the Agreement.

The motion addressed herein seeks the Special Master's approval and recommendation to the Court of the settlement agreement regarding the Colorado River Indian Reservation dispute.

The achievement of this proposed settlement is to the credit of the parties and is the result of extensive negotiation. It resolves the water rights allocation issue which was at the heart of the dispute between the parties. It is a salutary result.

I point out, however, for the Court's consideration, that the original reference to me as a Special Master was to consider the State Parties' Motion to Reopen the Decree of October 10, 1989, "... To Determine Disputed Boundary Claims ..." and in my various opinions

in the case, that is what I have done.

It is true that boundaries determine acreage and acreage determines water rights, and it can be cogently argued that a settlement of water rights claims and allocations without reference to boundaries is sufficient to close the case.

My concern that this settlement agreement leaves unresolved the boundary dispute specifically referred to the Special Master has been addressed by the parties at my request, in a joint response of the settlement parties in a letter dated April 22, 1999 which is appended hereto as Appendix 4. In that response the point is made that the instant boundary dispute, originally a vehicle for water rights determinations, cannot resurface in the future in the context of a tribal water rights claim, thus achieving the finality which the Supreme Court reference was intended to achieve.

It seems apparent that the inclusion of California in this settlement could not have been achieved without that states' reservation of the right to challenge the boundary location for other reasons, but the state holds no water rights which would thereby be adversely affected. The resolution of the water rights issue without determination of the Colorado River Indian Reservation boundary achieves a final result as to water rights, allowing California to continue to litigate the boundary issue only if it arises in some context other than water rights. This conclusion allays but does not totally satisfy the concerns of the special Master that the settlement does not fully address the issue referred to him.

This conclusion does not address that aspect of the Court's reference to a Special

master intended to remove the clouds on the titles of non-Indian users, and that fact is the basis for anticipated objections to this settlement by West Bank Home Owners Association. But the Association is not a party to this litigation, its leave to intervene having been denied, and its objection therefore, is not within the purview of the settlement approval deliberations.

V. Recommendations

A. The Fort Yuma (Quechan) Dispute

As noted above, the Special Master has ruled that the United States and the Quechan Tribe are precluded from asserting a water rights claim for the disputed Quechan boundary lands, which obviated the need to address the merits of the boundary dispute. I recommend that the Court adopt that disposition of the controversy. Orders Nos. 4, 5, 7 and 13 are relevant to this decision and are fond in Appendix 2.

The United States and the Quechan Tribe have indicated their objections to this decision and their intent to file exceptions to that ruling.

B. The Fort Mojave Dispute

The achievement of these proposed settlements is to the credit of the parties and is the result of extensive negotiation. They resolve the water rights allocation issues which were at the heart of the disputes between the parties. It is a salutary result. The Fort Mojave settlement includes the boundary determination, and no boundary issue remains.

C. The Colorado River Dispute

The Supreme Court reference to me as a Special Master at the outset of this case was the result of the motion of the State Parties to reopen the 1964 Decree in order to finally determine the disputed boundaries of the Fort Mojave and Colorado Indian Reservations, which were left unresolved in *Arizona I* and to finally determine the amount and priority of the water rights for those reservations as a result of such determinations.

The United States and the Tribes did not oppose this motion and it was granted on October 10, 1989. 493 U.S. 886 (1989).

Extensive litigation before me followed and boundary determinations were made. In the Colorado River Indian Reservation settlement those rulings are expressly nullified as among the settling parties and the settlement is effectuated by agreed water rights allocation.

As a result, the instant boundary dispute, originally a vehicle for water rights determinations, cannot resurface in the future in the context of a tribal water rights claim, thus achieving the finality as to water rights which the Court's reference was seemingly intended to achieve.

That result, however, leaves open a long standing boundary dispute which affects rights other than water rights, and sets aside for redetermination at an unknown future date, the boundary determination made by the Special Master in this case.

Nonetheless, this decision finally determines boundary claims as to the Fort Yuma and Fort Mojave reservations. As to the Colorado River dispute, the agreement on water rights allocations is a major achievement as

to the central issue of water rights and should not be abandoned because peripheral issues remain. These considerations weigh heavily in favor of acceptance and approval of the settlement presented here despite its failure to lay to rest the Colorado River Reservation boundary dispute.

The Special Master has reviewed the Fort Mojave and Colorado River settlement agreements and supporting memoranda, has concluded that their approval would equitably resolve the water rights disputes in the matter referred to me, and recommends that they be approved by the Court.

The effectuation of this settlement, both as to the Fort Mojave and Colorado River reservations, can be achieved by a supplemental decree which amends this Court's decree of March 9, 1964, and amends also the Court's supplemental decree of January 9, 1979. A proposed draft of such a supplemental decree is attached hereto as Appendix 6.

The motion to approve the settlements agreed to by the United States, the State of California, the State of Arizona, the Fort Mojave Indian Tribe, the Colorado River Indian Tribes, the Metropolitan Water District of Southern California and the Coachella Valley Water District is granted and approval of the agreement is recommended to the Supreme Court of the United States.

Dated: July 28, 1999

Frank J. McGarr
Special Master

(10)

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

APPENDIX I
REPORT AND RECOMMENDATION

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UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

APPENDIX I
SUMMARY OF OPINIONS

On October 10, 1989, the United States Supreme Court granted the motion of the States of Arizona and California to reopen the decree in *Arizona v. California, No. 8 Original* to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations, 493 US 886 (1989).

I was appointed as Special Master to hear the parties and to make recommendations to the Court. Since that time, the matter has been the subject of a series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues, which Memorandum Opinions are included with this Report and Recommendation. The central issue in the case was decided in Order No. 14 dated September 20, 1993, which held that the western boundary of the Colorado River Indian Reservation was a riparian boundary.

I

The litigation of this matter before the Special Master has resulted in twenty-two Orders, some procedural and some accompanied by memoranda deciding substantive issues. The more significant substantive orders are summarized as follows.

Order No. 1: Dated June 1, 1991. Set the pre-trial issues to be heard and set a hearing date thereon. Subsequent orders dealt with deposition and document discovery matters.

Order No. 4: Dated September 6, 1991. Dealt with a variety of issues and held:

(1) The Quechan Tribe is not precluded from asserting water rights based on boundary land claims in this proceeding, despite the contention of the States that the Fort Yuma boundaries were earlier fixed and that the Quechan Tribe is barred by the doctrine of res judicata.

(2) However, the Quechan Tribe filed a suit in the U. S. Court of Claims and by way of settlement of that suit, ceded its boundary lands to the United States in exchange for Fifteen Million Dollars in 1983, and is thus precluded from reasserting that claim in this proceeding.

(3) The parties disagreed as to whether the Supreme Court, in instituting these proceedings before a Special Master to determine the Western boundary of the Colorado River Reservation, intended the resolution of the location of the entire disputed Western boundary of the Colorado River, or only a portion of that boundary. It is determined in Order No. 4 that the reference to the Special Master intended resolution of the entire boundary and the matter has proceeded on that basis.

Order No. 5: Dated January 20, 1992. Addresses the motion of the United States for reconsideration for Order No. 4, holding that its claim in this case has been earlier settled and cannot be reasserted. The motion for reconsideration was denied.

Order No. 7: Dated May 15, 1992. The Quechan Tribe joins the United States in a further motion for reconsideration of Order No. 4, which motion is denied.

Order No. 8: Dated September 21, 1992. The Colorado River Indian Tribes moved for joinder in the proceedings of all individuals and entities with claims to land in the area asserted by the Tribes to be part of the Colorado River Indian Reservation. The State Parties opposed the motion; the Motion to Join Additional Parties was denied.

Order No. 9: Dated November 4, 1992. The states of Arizona and California moved for a summary judgment to the effect that the Executive Order of May 15, 1896 established the west bank of the Colorado River, subject to erosion, accretion and avulsion, as a portion of the western boundary of the Colorado River Indian Reservation. The tribes and the United States opposed. The State Parties Motion for Summary Judgment was denied.

Order No. 11: Dated March 10, 1993. A proposed pretrial order approved by the parties, was approved by the Special Master.

Order No. 13: Dated April 13, 1993. The renewed motion of the Quechan Tribes for a second reconsideration of Order No. 4, excluding them as claimants in this case was denied.

Order No. 14: Dated September 20, 1993. A memorandum, after hearing, holding that the Executive Order of 1876 established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not a fixed line. Therefore, the Executive Order of 1876 did not create additional water rights for the Tribes.

Order No. 15: Dated October 13, 1993, a procedural order setting a response time on the State Parties' Motion for Clarification . A subsequent opinion on a Motion for Clarification, dated November 10, 1993, was also mistakenly numbered Order No. 15

The Motion for Clarification raises the issue that the determination of the western boundary of the Colorado River Indian Reservation as a moving boundary does not resolve whether the boundary is the west bank of the river or the mid-channel line. The Opinion specifically holds that the Executive Order of 1876 meant the west bank, and this need not be clarified. The Opinion recognizes that no issue was presented or decided as to whether California's ownership of the west half of the river prior to the Executive Order of 1876 supports the conclusion that the Executive Order conveyed more than it had the right to convey, with the consequence that despite its language, it conveyed to the mid-channel line as a matter of law. This issue was deferred for further briefing and hearing, preferably in conjunction with the determination by the Master of the issue of the extent of practicably irrigatable acreage, and was subsequently addressed in Order No. 18..

Order No. 16: Dated March 20, 1995. This order addresses the motion of the State Parties for summary judgment, holding that the legal effect of the Executive Order of May 15, 1876 was to establish the mid-channel of the Colorado River as the western boundary of the disputed portion of the Colorado River Indian Reservation. This contention is based on the argument that although the 1876 Executive Order has been held to establish the west bank as a boundary, the Executive Order was legally enabled to convey to the mid-channel only because of California's prior rights of ownership.

The second of the State Parties' motions for summary judgment flows from the first. The State Parties argue that the Reservation's practicably irrigatable acreage should be

reduced by the amount of riverbed acres owned by Arizona and California as a result of the mid-channel boundary determination described above.

In an extended discussion and opinion on these motions, the State Parties Motion for Summary Judgment on the claimed mid-channel location of the Reservation boundary is denied, and as a consequence of this ruling, the State Parties' motion for a summary adjustment of water rights flowing from their mid-channel claim is also denied.

Order No. 17: Dated March 29, 1995. The West Bank Homeowner's Association filed a Motion for Leave to Intervene, which in a Memorandum Opinion was denied. This ruling was followed by an Order of the Supreme Court, dated April 24, 1995, denying the West Bank Homeowner's Association's Motion for Leave to Intervene.

Order No. 18: Dated September 28, 1995. The Colorado River Indian Tribes, joined by the United States moved for a summary judgment holding that as a consequence of a California statute enacted in 1872 (CCC-830), granting the land between the high and low watermarks on the west side of the river, the 1876 Executive Order divested the lands above the high water mark of their riparian character, and as a consequence , despite the express intent of the 1876 Executive Order to create a riparian boundary, it actually created a fixed boundary along the ordinary high watermark as it existed in 1876.

The State Parties filed a cross motion for summary judgment seeking a ruling that the California statute had no application to the dispute before the Special Master.

In a Memorandum Opinion and Order, the Motion for Summary Judgment of the Tribes and the United States was denied and the Cross Motion for Summary judgment of the State Parties was granted.

Order No. 19: Dated January 18, 1990. The issue of riparian versus fixed boundary was relitigated in the context of cross summary judgment motions. The ruling was, once again, that the 1876 Executive Order of President Grant intended to and achieved the establishment of a riparian boundary, not a fixed boundary. Once again, the Tribes and the United States' Motion for Summary Judgment was denied and the cross motion of the State Parties was granted.

Order No. 20: Dated April 3, 1996. The motion of the State of California for two modifications of Order No. 19 is denied.

II

In sum, the consequence of the various orders and opinions reviewed above is as follows:

A. It has been held that the Quechan Tribe of the Fort Yuma Reservation is precluded from asserting an additional water rights claim in *Arizona v. California* for certain disputed boundary lands because of a final claims court judgment of August 9, 1983, in Indian Claims Commission, Docket No. 320. (Memorandum Opinion No. 4, dated September 6, 1991). This issue having been finally resolved in the proceeding before the Special Master is referred to the United States Supreme Court with a recommendation that the Court adopt this determination.

B. The western boundary of the Colorado River Indian Reservation is a riparian boundary.

C. A California statute enacted in 1872 (CCC-830) does not alter the conclusion stated in (B) above.

The issue currently awaiting determination is the Special Master's ruling on the motions of the parties seeking the Special Master's approval and recommendation to the Court of the settlement agreement.

I call attention to the fact that the Quechan Indian Tribe has been precluded from seeking a final determination of the boundary of the fort Yuma Reservation. Orders Nos. 4, 5, 7 and 13 are relevant to that decision, and counsel for the tribe has indicated his intention to object to that portion of this report.

Dated: _____, 1999

_____
Frank J. McGarr
Special Master

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UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA	)	
	)	
Plaintiff,	)	No. 8 ORIGINAL
	)	
v.	)	
	)	
STATE OF CALIFORNIA, et al.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER NO. 4

This case pends as the result of an order of the Supreme Court of the United States reopening an earlier decree and appointing a Special Master to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Reservations.

It has been determined that the disposition of certain preliminary issues will facilitate the conduct of discovery and the preparation for hearing of the boundary determination issues.

Several preliminary issues have been identified and briefed by the parties, and the consideration of and disposition of these issues is the purpose of this memorandum.

I

The first question is whether the United States and the Quechan Tribe are precluded from asserting a claim for water for certain lands added to the Fort Yuma Reservation as a result of the Secretary of the Interior's order of December 20, 1978. The

legal basis for the preclusion would be the doctrine of res adjudicata.

The Fort Yuma dispute involves approximately 25,000 acres of land in the vicinity of Fort Yuma in California, and the question is whether these disputed boundary lands are part of the Fort Yuma reservation, with a consequent increase in water rights allocated to Fort Yuma by the 1964 Decree in Arizona I. At the time of the Arizona I controversy, there was extant a 1936 Interior Department Solicitor opinion (The Margold Opinion) to the effect that the disputed lands were not part of the reservation.

The United States made no claim to these lands in Arizona I, apparently because the Margold Opinion was considered controlling, and the Margold holding was affirmed by the Interior Department on two subsequent occasions in 1963 and 1977.

Later in 1977 a newly appointed Solicitor Krulitz issued an opinion overruling the three earlier Solicitor opinions and the Secretary of Interior issued an order revising the boundary of the Fort Yuma Reservation to include the disputed lands. These actions of the Solicitor and the Secretary were sua sponte; without notice to affected parties and without hearing.

Based upon this ruling, the United States filed a motion to reopen the decree in Arizona I to assert a claim for water rights based upon the newly formulated Fort Yuma boundaries, and claimed also a priority date for the water rights based upon the formerly

disputed lands, of January 9, 1884, the date of the Executive Order creating the reservation."

It is the position of the States that in the hearings before Special Master Rifkind in Arizona I, the United States (and all other parties) relied upon the Margold opinion, accepted without contest the pre Krulitz Fort Yuma boundaries, and within those boundaries claimed in addition to land being irrigated, the maximum possible "practically irrigable" lands, which claim was recognized in full by Master Rifkind and which determination was adopted by the Supreme Court in its 1964 decree.

In a attempt to fix then present perfected rights, Article II(d)(5) of the 1964 Decree required the parties to furnish a list of perfected rights within 2 years, but the State parties and the United States were unable to agree on such a list and the State parties submitted the matter to the Supreme Court for determination. Further negotiations resulted in an agreed upon Supplemental Decree issued by the Court in 1979. The States argue that while the Supreme Court in this Supplemental Decree expressly reserved boundary issues for future determination as to the other two reservations, there was no reservation of boundary issues for future determination as to Fort Yuma, since no issue of boundary dispute had been raised by the parties.

The current motion to reopen Arizona I to finally determine the disputed boundaries of the three reservations becomes the context for the States claim that Fort Yuma boundaries were

earlier fixed and that res adjudicata bars further consideration of this issue as to Fort Yuma.

The Quechan Tribe of the Fort Yuma Reservation disagrees and points to the provision of the 1979 Supplemental Decree providing for the adjustment of Water rights on all three reservations "in the event that the boundaries of the respective reservations are finally determined." This response does not dispose of the issue, but merely rephrases it. The Supplemental Decree can be construed as saying that boundaries of Fort Yuma having been finally determined and res adjudicata, water rights may be allowed only on those formerly adjudicated boundaries as to Fort Yuma and on boundaries yet to be resolved on the other two reservations.

The State parties cite Nevada v. United States, 463 U.S. 129 in support of their contention that res adjudicata applies to the Fort Yuma boundary issues here. This case cites the traditional principle of res adjudicata and applies it to a situation where, the United States, having litigated to a conclusion the recognition of water rights for an Indian Tribe, could not in later litigation seek rights inconsistent with those previously determined.

The case tells us merely that the time honored principle of res adjudicata applies to the United States in a case involving an Indian Tribe and water rights claims, and that despite the seemingly endless pendency of such cases, the importance of

achieving finality in judicial decisions is still a viable principle.

The States argue further that the finality rationale they seek to have applied here was relied on by the Supreme Court in an analogous situation in Arizona II. In 1978 the United States moved to modify the 1964 Decree in order to obtain additional water rights for certain omitted lands. The State parties argued that the issue had been determined finally by the 1964 Decree and that the later claim was precluded. The court ruled that the extent of irrigable acreage within the uncontested boundaries of the reservation was settled by the 1964 decree. If one accepts the States argument that the Fort Yuma boundaries were fixed and uncontested in the proceedings eventuating in the 1964 Decree in Arizona I, this case is much to the point.

It is a fact that the court in 1983 granted additional water rights to the Fort Mojave reservation for lands added thereto pursuant to the 1979 decree, but the States argue that the factual situation there was the basis for an exception to the rule of res adjudicata not present here, in that it was based on circumstances not known in 1964.

In this connection, it should be noted that in 1964, a circumstance unknown to the United States was the fact that the Secretary of the Interior decision (the Margold opinion) on which it relied would be reversed ex parte by a later appointed Secretary.

The United States, and the Quechan Tribe take the position that despite the fact that the U.S. as trustee for the Quechan Tribe (the Tribe was not a party) did not assert water rights claims for Fort Yuma boundary lands in 1960, the Tribe is not precluded from doing so now, for the reason that 1979 and 1984 Supreme Court decrees in the case provided that water rights therein fixed could be adjudicated in the future as reservation boundaries were finally determined.

As discussed earlier, this language relied upon by the Quechan Tribe does not dispose of the issue. While it clearly leaves for future determination adjustment of water rights as boundaries are determined, it has no application to the Fort Yuma boundary question if in fact the Fort Yuma boundary had been earlier fixed, which takes us back to the undisputed fact that in the 1964 determination, Fort Yuma made no boundary claims.

The United States made no water rights claims in the 1964 decree because the United States necessarily relied on the 1935 Secretary of the Interior opinion, the decree that all Fort Yuma boundary lands had been ceded by the Quechan Tribe to the United States, which action foreclosed such claims and thus foreclosed any possibility that the United States, as trustee for the Quechan Tribe, could assert water rights claims on behalf of the Tribe, based on claimed Fort Yuma boundary lands. It had no other option. But it is clear that the later Secretary of the Interior opinion arbitrarily changing this decision was a

circumstance not known in 1964, thus constituting an exception to the application of the rule of res adjudicata.

While, therefore, I agree with the conclusion of Master Tuttle that the 1964 Decree may be read to mean that future boundary determinations referred to, apply only to two reservations, and not to Fort Yuma, the overall and final determination of this aspect of this close question must be in favor of the Quechan Tribe, I hold that the Tribe is not precluded from asserting water rights based on boundary land claims on this proceeding, because although the U. S. on behalf of the Tribe failed to assert such claims in the proceeding leading to the 1964 decree, a later and then unknown circumstance bars the application of the doctrine of res judicata to this issue.

This leaves as the only bar to the Quechan Tribes boundary lands claims in this case, the question whether the settlement by the Tribe of its U.S. Court of Claims suit filed in 1951 and settled in 1983, ceded its boundary lands to the United States in exchange for 15 million dollars, with the final order in the case effective today despite the intervening 1978 action of the Secretary. The Quechan Tribe is not precluded from litigating its boundaries by any circumstance or argument raised by the State parties with the exception of this remaining contention that the Quechan Tribe lost its claim to title to the lands involved herein by the settlement its Court of Claims case, and did not regain ownership of those lands by virtue of the

Secretary's later reversal of the Margold opinion in 1978. The issue thus stated focuses upon the exact notice and terms of the settlement and what the 15 million paid to the Tribe brought in exchange. If it paid the Tribe for title in the U.S. of the lands in question, the Quechan Tribe has already settled the claims it asserts here. A full understanding of this settlement is vital to the determination of the impact it has on the standing of the Quechan Tribe to claim in this case.

We are led therefore to the issue raised by the parties as to the discoverability of the United States memorandum recommending the settlement in question.

Despite the natural inclination to view this memorandum as possibly helpful in understanding the scope of the settlement, the State cannot make the required showing of need and hardship, nor can it be argued that an attorney's mental impressions communicated to his client in any circumstances present here, be subject to compulsory disclosure.

The assertion of both attorney client privilege and work product protection is meritorious. The settlement agreement and the court order implementing it stand alone as the source from which the rights of the parties flow. The holding and effect of the Court of Claims decision on this case will be decided upon the public record, and the demand by the States for the United States memorandum recommending settlement is denied.

II

Turning to the Court of Claims record, Claims Court Docket No. 320, the petition therein of the Quechan Tribes of the Fort Yuma Reservation regarding its claimed title to certain lands, is based upon an Executive Order of President Chester A. Arthur dated January 9, 1894, grating to the Tribe a tract of land on the California side of the Colorado River, with later Executive Orders and governmental actions diminishing the land granted to the detriment of the Quechan Tribes and culminating in a 1893 Agreement with the Quechans, which the petitioner in the Claims Court now alleges was entirely nugatory. Further governmental actions additionally reduced Quechan lands. The case was ultimately settled for $15 million paid to the Tribe in 1983.

I assume for purposes of this Opinion that the Fort Yuma boundary lands being claimed by the Quechan Tribe in this litigation are within the lands subject to the Court of Claims case, docket No. 320.

In the stipulation for settlement of that matter, the Quechan Tribe in a settlement approved by the Tribal Council and presented to the court by its attorney of record, agreed that in exchange for a $15 million judgment the Tribe would ". . . be barred thereby from asserting any further rights, claims or demands against the defendant and any future action on the claims encompassed on docket no. 320 . . ."

The parties in the agreement ". . . waive all rights to appeal from or otherwise seek review of such final determination . . ."

If the boundary lands claim of the Quechan Tribe here are lands also the subject of and part of Court Claims Docket No. 320, and I assume that this is so, the above quoted language precludes the Quechan Tribe from water rights claims based on boundary lands claims in this case.

The ex parte action of the Secretary in 1978 cannot be viewed as any way dispositive of this issue. The final order of the Court of Claims addresses itself to all the claims of the Tribe then pending, presumably including the land in issue here, and is not affected, as a final judicial decision, by an earlier administrative order.

Therefore, it must be concluded that by virtue of the Court of Claims settlement and the money received by the Quechan Tribe as the result of that settlement, the Tribe is precluded from further boundary claims as to the Fort Yuma Reservation, and is thus precluded from asserting claims in this proceeding.

III

The question arises whether the Supreme Court, in instituting these proceedings, intended the final determination of the entire disputed western boundary of the Colorado River Reservation, or only that portion of the boundary dealt with in the Secretary of the Interior's Order of June 3, 1969. The

States seek a final determination of the entire western boundary. The United States and the Colorado River Indian Tribes argue that only the upper portion of the disputed western boundary is justiciable in this proceeding. They contend the lower one-third of the boundary cannot be litigated here because there has been no final determination of that portion of the western boundary by the Secretary. Some background is helpful in addressing this issue.

In Arizona I, Special Master Rifkind held a full evidentiary hearing on the entire boundary dispute. The California parties contended that the 1876 executive order established the river as the boundary, a boundary therefore which changed as the river did. The United States argued that the 1876 boundary remained fixed despite changes in the course of the river. This fundamental disagreement remains central to the dispute between the parties in this proceeding.

The Rifkind determination of this issue was found by the Supreme Court to have been unnecessary and the court reserved the issue for future determination, but accepted the water allocations based upon the boundary determination Master Rifkind made.

Later in 1969, the Secretary of the Interior issued an ex parte order which determined only the northerly two-thirds of the disputed western boundary. This is the fact underlying the position of the United States and the Tribes that under the resolution of water rights scheme envisioned by the Supreme

Court, the determination of water rights is based upon the final determination of boundaries and that the final determination by the Secretary of the northern portion of the boundary not only makes water rights thus affected justiciable, but is the limit of the jurisdiction of the Special Master.

The Tribes further argue that the upper portion of the boundary is unique in that the adjacent lands are in federal ownership whereas in the southern section private rights are involved. While that consideration may have motivated the Secretary in 1969, it is not necessarily controlling here. The determination of boundaries for the purpose of allocating water rights need not be considered as res adjudicata as to private title questions.

As earlier said, the central issue in this case is the determination of the principle to be applied to the application of the 1876 executive order, that is whether that order created a fixed boundary or a boundary that changed with the course of the river. The United States and the Tribes impliedly expect that the boundary decision could determine a fixed boundary as to one portion of the reservation and a shifting boundary as to another, as against the compelling logic that however the boundary dispute is resolved, that resolution should be uniformly applied.

Stated another way, once the principle of boundary determination embodied in the 1876 order is determined, consistency compels its application to the entire reservation, and that decision should be made now rather than later. The fact

that the meandering of the river will probably benefit one party or another as to one portion of the reservation, and be detrimental as to the other, cannot justify any expectation that a differing principle of determination could be applied to each section.

More compelling is the reading of what the Supreme Court intended in its reference in this case as it granted the State parties' motion to reopen the case. The court at that time had before it a history of lengthy litigation which had produced little by way of resolution of issues. Largely as a result of the court's piece-meal limitation of earlier Special Master's jurisdiction, there had been produced a situation which had not only failed to provide any simplification of the case, but had created a litigious marathon which promised to be interminable.

An examination of the pleadings supports the State parties contention that the court finally intended to resolve all boundary issues as a basis for the determination of all consequent water rights issues. The southwestern boundary of the reservation was not intended to be excluded from the reference. The court's reference to the Special Master is to determine the disputed boundaries of the Fort Mojave, Colorado River and Fort Yuma Indian Reservations. There is no exclusion, in fact, or by implication of any portion of the boundary involved. It is the determination of the Special Master that the entire boundary dispute has been referred, and his intention is to address and resolve the western boundary question, both north and south. It

should be emphasized that this boundary determination is to create a basis for the allocation of water rights to the claimants in this case. It is not intended to assert jurisdiction over persons not parties or to determine titles to land.

IV

The parties differ sharply as to the use of the evidentiary record developed in Arizona I. The States would have this court accept and rely on that earlier evidence, subject only to the right of all parties to supplement the record. The Tribes would like to see the issues before this Special Master determined on a fresh record. The United States takes no position on the issue.

The United States fully litigated the issues in Arizona I as trustee for the Tribes who intervened later. The argument of the Tribes that they cannot be bound by a record in a proceeding to which they were not a party is not persuasive. Their interests were fully and adequately represented, and when the Tribes later petitioned to intervene, they, like all intervenors, took the case and the record as they found it. To the extent that evidence was admitted by a prior Special Master, it is deemed properly admitted, although in any use in this proceeding of evidence from an earlier proceeding, objections to its admissibility may be raised and will be resolved.

Further discussion of this issue is not required in light of the determination made at the time this issue was discussed before the Special Master. As was said at that time, parties

wishing to rely on evidentiary matters in earlier records shall designate such portions of the record. The Special Master will hear and rule on objections to such designations before the final hearing in this matter. Because there were only three witnesses in Arizona I, this problem will seemingly relate largely to documents. This latter circumstance robs of some of its vitality the Tribes claim that admitting earlier evidence will deprive the Special Master of an opportunity to judge the credibility of witnesses.

The refusal of this court to allow the Quechan Tribe to re-litigate the settled boundaries of the Fort Yuma reservation seems to moot the question discussed in the briefs as to the determination of practically irrigable lands in Arizona II as part of this proceeding. A further discussion of that issue when we meet again will assist the court in its final determination.

By way of summary,

1. The Quechan Tribe is precluded from re-litigating Fort Yuma boundary claims;

2. The reference of this case to a Special Master intended the resolution of the entire western boundary of the Colorado River Reservation;

3. The evidentiary record developed in Arizona I may be used in this proceeding, subject to certain limitations. The use of the evidentiary record on the practically irrigable acreage on the Fort Yuma disputed boundary lands developed in Arizona II seems to have been mooted by the preclusion of the Quechan Tribe's claim.

This Memorandum has addressed the issues argued and briefed by the parties with the belief that their resolution will pave the way for completion of discovery.

Dated: Sept 6, 1991

By: Frank J. McGarr
Special Master

ARIZONA V. CALIFORNIA, ET AL.
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UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL MEMORANDUM OPINION AND ORDER NO. 5

In a Memorandum Opinion and Order No. 4 of September 6, 1991, I held that the United States was precluded from asserting claims for water for lands held in trust by the United States for the Quechan Tribe of the Fort Yuma Indian Reservation. That preclusion was based upon the decision that the Tribe had already been compensated for the extinguishment of its title to the land at issue here by the settlement of the case in the Court of Claims known as Docket 320.

The United States has moved for reconsideration of this decision, the matter has been fully briefed by the Justice Department for the United States and in opposition by the Metropolitan Water District of Southern California, the Coachella Valley Water District and the States of California and Arizona.

The United States argues in support of its motion for reconsideration that the final order of the Court of Claims closing out Docket 320 cannot be the basis for a resolution of this matter. The United States relies upon other actions taken by the United States, and in particular, on the 1978 order of the Secretary of the Interior, relying on a Solicitor's Opinion

overruling earlier decisions and revising the boundary of the Fort Yuma Reservation to include the disputed lands.

The United States posits its motion on the argument that the Secretary's Order is valid, thus satisfying the Tribe's then pending claim, which claim then became moot and was not a part of the settlement agreement of 1983. To put it another way, the United States would ignore the Court of Claims because the Quechan Tribe settled, for 15 million dollars in that Court, a case that had been mooted and was thus not pending.

As ingenious as this argument is, it is a new-comer on this long litigated scene. The United States certainly did not pay $15 million to the Quechan Tribe to settle a Court of Claims case which it believed was not pending because it had been mooted by a Solicitor's ruling many years before. The Tribe in arguing that it already owned the land the Solicitor's ruling gave it, is hard put to explain why it continued to pursue the same land in the Court of Claims and accepted $15 million in exchange for the relinquishment of that claim.

The Tribe's answer to this dilemma is that to conclude that the United States so acted defies common sense, and so it does. This leads to the conclusion that the United States in settling the Court of Claims case, commonsensibly concluded that the Tribe had not achieved Title under the Solicitor's opinion, and the Tribe in both filing and settling the case was clearly of a mind that the Solicitor's opinion had not settled the Title question and that only the Court of Claims could.

The United States in a footnote makes the Reductio Ad Absurdum argument that if the Special Master is right that the $15 million extinguishes the Tribe's claim to the land, then the United States now owns the land free and clear of any interest of the Tribe. While that issue is not being precisely decided in this Opinion, it is not an unthinkable conclusion.

Certain documents are pointed out by the United States, such as an irrelevant pre-trial stipulation in Docket 320, which cannot be read to modify the final order in that case, as well as letters to the Tribe from its counsel or from the Secretary approving the settlement, which cannot affect the unambiguous impact of the court's final order in that case.

The stipulation of May 26, 1983 referred to above, incidentally, was rejected by the United States in part as proposed for the reason, agreed to by the Special Master here, "because of the Supreme Court Opinion in Arizona v. California that there must be a judicial (emphasis supplied) determination of the Quechan boundary."

The resolution of the Claims Court Docket 320 case is clear and unambiguous and leaves no room for parole evidence or interpretation contrary to its clear meaning. Nothing in the judgment language diminishes its impact on the issue considered here, that is whether it finally resolves the Quechan Tribe claim in such a manner as to preclude the Tribe from further boundary claims as to the Fort Yuma Reservation in this proceeding.

The United States places its principal reliance on the 1978 Secretarial order and complains that the Special Master virtually ignores it. So did the United States in the Court of Claims, very probably because the ex parte secretarial reversal of earlier decisions could not be deemed to rob the Court of Claims of its jurisdiction over the parties before it and the land in issue, in a case in which the United States was claiming for the Tribe lands which it now argues the Tribe then owned. The 1978 Secretary's Order did not and could not deny the Court of Claims jurisdiction over the claim the United States had brought before it. In the Court of Claims all the circumstances of the case indicate that at that time the United States agreed with this conclusion. The final outcome of the Court of Claims case is dispositive of the Quechan Tribe claim and it cannot be reopened here.

The motion of the United States to reconsider the Memorandum Opinion Order No. 4 of September 6, 1991 is denied.

Dated: Jan 29, 1992

Frank J. McGarr

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL MEMORANDUM OPINION AND ORDER NO. 7

In Order #4 of September 6, 1991, it was determined that the United States was precluded from asserting claims for water for lands held by the United States in trust for the Quechan Tribe of the Fort Yuma Indian Reservation.

The United States has moved for a reconsideration of that decision and an allowance of the assertion in this litigation of the Quechan Tribe claims. The Tribe, as an intervenor in the case, has similarly moved.

The State Parties have filed a memorandum in opposition, the United States has replied and the matter is fully briefed. This Opinion addresses that single issue.

The opinion denying the Quechan Tribe standing in this litigation turned on the effect of a settlement of a case brought by the Tribe in the Court of Claims which was settled in 1984 by a payment of $15 million to the Tribe. The United States and the Tribe argue that the Special Master's interpretation of that settlement is incorrect. It is the thrust of their argument that a Secretary of Interior's Order in 1974 was not correctly

apprehended, and its impact on the controversy not properly understood.

The reference by the Master to the Secretary's Order as sua sponte and ex parte correctly describes the order. Its validity need not be determined here, although at the time of the settlement central to this discussion, its validity had been challenged and was open to question, and it could not have been considered by the Tribe as an absolutely guaranteed grant of rights to them. If the Tribe, represented by the United States, was really settling only title to lands other than those covered by the 1978 Secretary's Order, this extraordinarily important fact appears nowhere in the settlement record, despite the fact that the lands covered by the 1978 Order relied upon here were central to the Court of Claims case which was being settled.

The plain and unambiguous effect of the settlement and Order of 1984 cannot be modified by speculation as to what the parties meant or by inferences as to their intent drawn from other documents. And if the Secretary's order of 1978 had an impact on the earlier filed and later settled Quechan Tribes' Court of Claims case, as the United States now argues, that fact nowhere appears in an unambiguous settlement agreement approved by the Court and thus made the final Order in the case. In the absence of ambiguity, the law barring parole evidence is too well settled to require citation.

It is the essence of the position of the Tribe and the United States that the proceeding in Docket No. 320 involved two

claims by the Quechan Indians, only one of which was settled. The two issues involved, it is argued, were the claims by the Tribe that the taking in 1893 had not adequately compensated the Tribe, and also that because the taking was unfair, it was invalid and the Tribe was entitled to damages for the unlawful use of its lands thereafter.

Thus, it is argued, the Tribe regarded as a separate issue its title to the land and the consequent water rights, as to which issue it looked to a separate forum.

It is also the Tribe's position that the final order in Docket No. 320 is not a final determination of a fully litigated issue and that preclusion cannot bar the Tribe here because it cannot be said that the issue of title to the lands in the Tribe was fully litigated and finally decided. The validity of the Tribe's position depends on the accuracy of its statement that issue preclusion does not operate where the first proceeding is resolved by settlement.

The argument of the United States and the Quechan Tribe therefore rests on two pillars:

a) Docket No. 320 disposed only of a damage claim for taking and trespass and did not affect title to the reservation land and its consequent water rights.

b) or alternatively, if title was an issue, it cannot preclude later claims because it was settled and not fully adjudicated.

In addition, the United States and the Tribe argue that whatever the effect of the final disposition of Docket No. 320, it cannot be relied on by parties not involved in that litigation since it governs only claims against the United States. The Tribe concedes that the settlement and payment of money forever bars the Quechan tribe from further claims against the United States as to this reservation land, but contends that the settlement has no preclusive effect as to third parties, unless the issue was the same in the present action, was actually litigated and is essential to a prior final judgment.

This position mandates the conclusion that the United States, having acquired title to the lands in question and having settled claims against it as to the validity of that acquisition, may now, as adjudicated title holder, denigrate its title position for the benefit of the Tribe and to the detriment of others in this litigation because those others were not involved in the earlier litigation. This argument is without merit. Title to land is absolute. It is in the title holder as to the world, and cannot be asserted as to some parties and denied as to others.

The requirement of comparability it is further argued, is not met because of the uniqueness of proceedings under Indian Claims Act and because the litigation involves a waiver of sovereign immunity. Neither of these considerations affect the finality or effect of a judgment.

Finally, the Tribe draws comfort from a clause in the Claims Court judgment to the effect that it " . . . shall not be construed as an admission by either party for the purposes of precedent or argument in any way". This language in the settlement judgment which expresses the traditional caution of settling parties that for purposes of other litigation they are not admitting anything, has no consequence to or limiting effect upon the final judgment. Despite the relied upon clause, the judgment is what it says and has such preclusive effect as its language supports, without regard to the clause under consideration.

Elaborating on the issues discussed above, the argument that Docket No. 320 has both a damage claim and a title issue and that only the damage claim was settled, is made in the context of a record which does not give support to that position. The essence of the Tribe's petition in Docket No. 320 was that the 1893 taking illegally extinguished the Tribes title to the land. What the Tribe sought was a determination of the title issue, and if successful, on that issue, the tribe sought consequent damages from the government for its wrongful use of the illegally taken land. The only viable basis for a damage or trespass claim was that the 1893 taking was illegal and that title therefore remained with the Tribe. When the Tribe accepted money in settlement of this claim, it relinquished its claim to title. The argument that the Tribe somehow settled its claim against the United States while yet retaining title, and did so with no word

of this unique circumstance appearing in the final judgment order is without merit. The Court of Claims closed the case with an order that barred the Tribe from the assertion of any further claims as to the lands in issue, and whatever the Tribe may have believed, then or now, as to its retention of title for water rights purposes, is not supported by the record in the case.

This leads us to the next question as to whether the final order extinguishing the rights of the Quechan Tribe can have a preclusive effect, either as res judicata or collateral estoppel when, as is true here, it was a settled issue rather than a litigated issue.

The contention of the Tribe that consent judgments entered as a result of settlement by the parties cannot be the basis of the defense of issue preclusion finds no support in the law. It is based on the argument that the settlement of Docket No. 320, the receipt of money by the Tribe, and the entry of a Final Judgment cannot and does not prevent the Tribe from prosecuting title to water rights which, it is claimed, were not affected. Docket No. 320 extinguished the Quechan Tribe claim to the land, and any claim to water rights, depending as such claim does on the ownership of the land, was also extinguished. The case of United States v. Gemmell, 535 F.2d 1145 (9th Cir.); cert. denied, 429 U.S. 982 (1976) and Kalispel Indian Tribe v. Pend Oreille, 926 F.2d 1502 (9th Cir. 1991), cert. denied, 112 S.C. 415 (1992) support this conclusion.

Central to the Tribes's position, is the contention that an issue not actually litigated cannot be the basis for preclusion. To put the matter more precisely, the question is whether a settlement of litigation resulting in a final judgment can have the same preclusive effect as the resolution to final judgment of the same matter after trial. The argument is based on the Restatement (Second) of Judgments (1982) P 256 to the effect that a matter stipulated to by the parties cannot be the basis of collateral estoppel. We need not concern ourselves with whether the case law supports this contention, since in fact it is not apropos here. We are not talking about a stipulation of fact or issue, we are talking of a final judgment in a case in which the parties here were parties there. In that factual context, the Gemmell and Kalispel cases support the result here reached. The matter is res judicata and the parties to that litigation are precluded from relitigating it again.

To accept the contention that a final judgment based on compromise has no real finality because it is not precedent in any other case between the same parties is to destroy the finality of judgments.

Further, the argument based upon the law of the case in Arizona v. California to the effect that the Tribe can be bound only by a "final determination of a fully litigated issue, (460 U.S. at 620) is of no effect here. A case terminated by a final dispositive order of the court is within the meaning of the

phrase "final determination of a fully litigated issue," whether the case was tried or settled.

The separate brief filed by the Quechan Tribe adds additional considerations to the argument discussed above by attributing some unique characteristics to Indian claims somehow distinct from other litigation vis a vis the finality of judgments. This contention carries no weight in this case. The Claims Court judgment extinguished the claim of the Tribe, as would be the effect of a final judgment in any litigation with any parties.

For the foregoing reasons, the motion of the United States and the Quechan Tribe for a reconsideration of Order #4 of September 6, 1991 is denied.

Dated: May 15, 1992

Frank J. McGarr

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL MEMORANDUM OPINION AND ORDER NO. 13

In Memorandum Opinion No. 4, (September 6, 1991) it was held that the Quechan Tribe was precluded from asserting a water rights claim for certain disputed boundary lands because of a final Claims Court judgment of August 9, 1983 in Indian Claims Commission Docket No. 320. Memorandum Opinions 5 (January 20, 1992) and 7 (May 15, 1992) denied the United States and the Tribe's petitions for reconsideration.

Before the Special Master now, and the subject of this opinion is the renewed motion of the Quechan Tribes for a second reconsideration of the decision in Order No. 4 of September 6, 1991.

The State parties have moved to either reject the motion or after consideration, to deny it.

The State parties argue that the instant motion, filed as it is 18 months after the original ruling, and 10 months after the denial of a motion to reconsider, cannot rely on any rule justifying its filing as a simple additional motion for

reconsideration. That is a valid point which alone justifies a denial of the motion to reconsider.

Because the Quechan Tribe has appended numerous public records not heretofore presented, from files of Docket No. 320 and from the District Court proceedings in Metropolitan Water District of Southern California v. United States, 628 F. Supp. 1018, (S.D. Cal. 1986), it may be analogous to a Rule 60(b) motion alleging newly discovered evidence.

The State parties address this possibility with the argument that Rule 60(b) is applicable only in the instance of really newly discovered evidence. The newly presented evidence here has all been of record in cases in which the Quechan Tribe has been involved or interested in, and cannot in any way be regarded as newly discovered.

Even regarded as a Rule 60(b) motion, the instant motion is not within the one year limitation provided by that rule.

The foregoing procedural considerations alone warrant a denial of the Tribe's motion being herein considered. But there are other considerations which lead to the same conclusion.

In the interim between the dismissal of the Quechan Tribe in 1991, and the denial of the motion for reconsideration by the Tribe in 1992 on the one hand, and the present motion for reconsideration on the other, there has been considerable discovery, a complete hearing on the issues in the case, a closing argument and a post-hearing briefing schedule, a substantial portion of which has elapsed.

There has also been a settlement of the Fort Mojave Indian Reservation boundary dispute which will be presented to the Special Master for approval shortly.

A readmission of the Quechan Tribe into the case, some nineteen months after the preclusion order of September 6, 1991,and within a significantly lesser number of months of its final resolution, is not feasible. Simple practicality dictates at this point in the case, that the Quechan Tribe look to its right to file exceptions to the Special Master's report to the court this upcoming Autumn.

The brief of the Quechan Tribe, on the basis of the earlier record in the case and the newly proffered evidence revisits the hearing and the settlement of Docket No. 320 and attempts once again to demonstrate that the case disposed only of the damage issues and not the question of the Quechan Tribes title to the land in question. The contention is not new, although argued more fully than before in this latest reconsideration attempt.

The Quechan Tribe argues very ably and in great detail the theory that Docket 320 and the settlement thereof does not affect title in the Tribe. But the conclusion in the earlier opinion being reconsidered, that the relinquishment of all future claims regarding the subject matter of Docket No. 320 in exchange for a sum of money extinguished the Tribe's title in the subject lands, remains valid. What has not changed is the fact that the record in Claims Court Docket No. 320 supports that conclusion and

leaves no room for parole evidence or interpretation contrary to its clear meaning.

The renewed motion of the Quechan Tribe for reconsideration of the Special Master's Memorandum Opinion No. 4 (September 6, 1991) is denied.

Dated: April 13, 1993

Frank J. McGarr
Special Master

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In The

UNITED STATES SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, et al.

JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT

The United States, the Fort Mojave Indian Tribe, the State of California, the State of Arizona, the Metropolitan Water District of Southern California and the Coachella Valley Water District (referred to jointly at "the settling parties") respectfully move the Special Master to include in his report to the Supreme Court recommendations that it (1) approve the Settlement Agreement which is Attachment One hereto and (2) a decree in the form of Attachment Two hereto. The grounds for this motion are described in the accompanying memorandum in support.

Respectfully submitted this 4th day of March, 1998.

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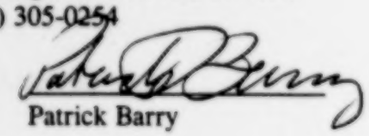
By: 
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In The

UNITED STATES SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, et al.

MEMORANDUM IN SUPPORT OF JOINT MOTION TO RECOMMEND APPROVAL OF SETTLEMENT AGREEMENT

The United States, the Fort Mojave Indian Tribe, the State of California, the State of Arizona, The Metropolitan Water District of Southern California and the Coachella Valley Water District (referred to jointly as "the settling parties") respectfully request the Special Master to include in his report to the Supreme Court recommendations that it (1) approve the Settlement Agreement which is Attachment One to the Joint Motion to Approve Settlement Agreement, and (2) adopt a decree in the form of Attachment Two to the Joint Motion to Approve Settlement Agreement. In support of this motion the settling parties provide the following comments.

I

BACKGROUND

The present proceedings stem from the Motion of the State Parties to Reopen Decree To Determine Disputed Boundary Claims With Respect to Fort Mojave, Colorado

River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) which, among other things, raised the question of whether the Fort Mojave Indian Tribe (Tribe) is entitled to additional water rights for lands which, in 1974, the Department of the Interior recognized as part of the Fort Mojave Indian Reservation in California ("disputed lands"). See Secretarial Order of June 3, 1974. Specifically, the "disputed lands" issue involves the appropriate western boundary for a tract of land called the Fort Mojave Indian Reservation Hay and Wood Reserve.

The attached settlement agreement resolves among the settling parties the water rights issues that are before the Special Master as well as the related issue of the proper location of the Hay and Wood Reserve boundary. The agreement is submitted to the Special Master for his review in order that he may include a recommendation for its approval in his final report to the Court.

II

NATURE OF THE AGREEMENT

The Settlement Agreement is straightforward. In order to facilitate the approval process, the settling parties briefly describe the terms of the Settlement Agreement:

STIPULATION (beginning at page 4):

1. The parties agree that the western boundary of the Hay and Wood Reserve shall be the boundary, as surveyed by the Bureau of Land Management in 1975, that conforms with the acreage description of 9,114 acres in the Executive Orders of March 30, 1870, and September 19, 1890.

   (a) The parties agree, however, that the Court shall make no finding or conclusion regarding the validity of the Secretarial Order of

June 3, 1974. Moreover, Arizona and California reserve the right to challenge the validity of that Order for the limited purposes of determining title to or jurisdiction over the last natural bed of the Colorado River. The United States and the Tribe reserve any defenses they may have to such a challenge.

(b) The parties agree that nothing in the stipulation is intended to determine title to or jurisdiction over the last natural course of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve.

(c) This paragraph reserves the States' claims to title to and jurisdiction over the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve and restates some, but not all, of the States' arguments in support:

(i) That the western boundary of the Hay and Wood Reserve was located on the east bank of the Colorado River when it was created;

(ii) That the United States lacked authority and the requisite intent to make the riverbed a part of the lands set aside as the Hay and Wood Reserve.

(d) This paragraph recites that the United States and the Tribe expressly reserve their claims to the bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve.

(e) The Stipulation shall not be construed to determine the validity of the arguments reserved by either the Tribe, the United States, the State of

Arizona or the State of California. Nor is the Stipulation to be construed as a waiver of sovereign immunity or subject matter jurisdiction by either the Tribe or the United States.

2. The parties agree that the Tribe's present perfected water rights for its California lands as set forth in *Arizona v. California*, 376 U.S. 340 (1964), 439 U.S. 419 (1979) and 466 U.S. 144 (1984) shall remain undisturbed by this Stipulation and Agreement.

3. Under this Settlement Agreement, the Tribe shall be entitled to an additional annual quantity of water not to exceed (a) 3,022 acre feet of diversions from the mainstream of the Colorado River or (b) the amount of water necessary to supply the consumptive use required for irrigation of 468 acres whichever is less.

4. The State Parties agree not to object to the use of the additional allocation of water on the Fort Mojave Indian Reservation lands in California consistent with the terms of previous decrees issued in this litigation from the date of this Stipulation and Agreement to the date of the issuance of a supplemental decree by the Supreme Court.

5. The Tribe or the United States on behalf of the Tribe will not claim or be entitled to additional Colorado River water for existing trust or allotted lands within the boundaries of the resurveyed Hay and Wood Reserve.

6. The Tribe waives all claims to additional water it may have for lands within disputed boundaries on the Intermediate Tract in California. This waiver does

not extend to Intermediate Tract lands in Arizona. However, nothing in the Stipulation shall be construed as a determination of title to or jurisdiction over lands within the Intermediate Tract.

7. The Tribe reserves the right to seek federal legislation confirming the boundaries of the Hay and Wood Reserve.

8. The Stipulation cannot be construed to (a) affect any claim to land of any person or (b) determine title to or jurisdiction over any such land.

9. This stipulation merges all other negotiations and understandings between the parties. It only effects those matters which are now before the Court.

10. By this Stipulation, the Tribe waives any claim against the United States arising out of the negotiation of the Agreement, the adoption of the terms of the Agreement, or the authority of the Tribe to enter into the Agreement.

III

CONCLUSION

The settling parties have worked diligently to resolve the issues related to this litigation. The settlement agreement is an equitable resolution of the issues presented in the disputes between the parties and before the Court and should be approved.

Respectfully submitted this 4th day of March, 1998.

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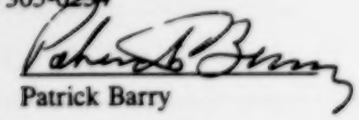
By: 
Patrick Barry

Attorney for the United States of America

STIPULATION AND AGREEMENT

The Fort Mojave Indian Tribe (hereinafter "Tribe"), the United States of America (hereafter "United States"), and The Metropolitan Water District of Southern California, the State of California, the State of Arizona and the Coachella Valley Water District (hereinafter "State Parties") hereby enter into the following Stipulation and Agreement.

I

RECITALS

A. On October 10, 1989, the United States Supreme Court granted the State Parties' Motion to reopen the Decree in **Arizona v. California**, No. 8 Original, to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations. 493 U.S. 886 (1989).

B. The boundary issues concerning the Fort Mojave Indian Reservation (sometimes hereinafter "Reservation") involve: the location of the western boundary of the Hay and Wood Reserve portion of the Reservation; the location of the western boundary of the Intermediate Tract portion of the Reservation;[1/] and the water rights associated with these disputed areas.

C. The Hay and Wood Reserve was initially surveyed in 1869 by Lt. George M. Wheeler of the U.S. Army Corps of

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1. Another issue, the amount of federal reserved water rights associated with the accreted lands to the checkerboard sections of the Reservation, all in Arizona - is agreed by the Tribe to have been resolved by the Decree in **Arizona v. California**, 466 U.S. 144 (1984).

Engineers. It was set aside as a military reserve by Executive Order of March 30, 1870. On September 19, 1890, the military reserve was transferred by Executive Order to the Department of the Interior for the benefit of Indians for Indian school purposes and became a part of the Fort Mojave Indian Reservation.

D. The 1870 Executive Order and the 1890 Executive Order describe the monuments marking the western boundary of the Hay and Wood Reserve as being "near the left bank" of the Colorado River. The Executive Orders also state that the boundaries contain 9,114.81 acres. The calls to the monuments would appear to be inconsistent with the acreage description.

E. The Hay and Wood Reserve boundary issue involves approximately 3,500 acres of land located west of the western boundary of the Hay and Wood Reserve as established by the 1928 General Land Office survey line referred to as the "Blout Survey" or the "Blout line", and claimed attendant maximum water rights of approximately 12,087 acre feet of water in addition to the amounts specified in paragraph F below.

F. In **Arizona v. California**, 373 U.S. 546 (1963) (**Arizona v. California I**), Special Master Simon Rifkind recommended that the Tribe be awarded water rights for the Hay and Wood Reserve portion of the Reservation in California based on the 1928 Blout Survey as the western boundary of the Reserve. The Supreme Court accepted this recommendation of an annual quantity not to exceed (1) 13,698 acre feet of diversions from the mainstream or (2) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 2,120 acres and for the satisfaction of related uses, whichever of (1) or (2) is less. The United States was enjoined from releasing

water except in accordance with this allocation. **Arizona v. California**, 376 U.S. 340, 345 (1964), Article II(d)(5).

G. On June 3, 1974, the Secretary of the Interior declared the Blout Survey null and void and determined that the western boundary of the Hay and Wood Reserve was approximately one (1) mile west of the Blout Survey based upon the courses, distances and acreage as described in the plats and notes of the survey accompanying the 1870 Executive Order ("1974 Secretarial Order").

H. In **Arizona v. California**, 460 U.S. 605 (1983) (**Arizona v. California II**), the United States and the Tribe claimed water rights for, and Special Master Elbert Tuttle recommended that water rights be awarded to, the portion of the Hay and Wood Reserve west of the 1928 Blout line based on the 1974 Secretarial Order. The Supreme Court rejected the recommendation on the ground that the 1974 Order was not a final determination within the meaning of Article II(D)(5) of the 1964 Decree, and that the boundary issues should be settled in other forums. 460 U.S. at 636-638.

I. The State Parties had sought review of the 1974 Secretarial Order, as well as Secretarial Orders affecting the Colorado River and Fort Yuma Reservations, under the Administrative Procedure Act, 5 U.S.C. §§551-706, in the United States District Court for the Southern District of California. **Metropolitan Water District of Southern California v. United States**, 628 F.Supp. 1018 (S.D. Cal. 1986). The case was ultimately dismissed for lack of jurisdiction based on the sovereign immunity of the United States. **Metropolitan Water District v. United States**, 830 F.2d 139 (9th Cir. 1987), **aff'd**

(by an equally divided Court), **California v. United States**, 490 U.S. 920 (1989).

J. On June 9, 1989, the State Parties petitioned the Supreme Court to reopen the Decree in **Arizona v. California** for the purpose of determining the disputed boundaries of the Fort Mojave, Colorado River, and Fort Yuma Indian Reservations and the amount and priority of their reserved water rights. The Supreme Court granted that petition on October 10, 1989. 493 U.S. 886.

K. In addition to the Hay and Wood Reserve boundary issue, the Tribe also claims that the western boundary of the Intermediate Tract portion of the Reservation is involved in the present proceeding. At issue are approximately 224 irrigable acres of land and attendant maximum water rights not to exceed 1,447 acre feet of water. The total land area claimed to be at issue is not known.

L. The Tribe, the United States, and the State Parties, by this Stipulation and Agreement, have settled all matters at issue between them in the proceeding now before the Supreme Court with respect to the Reservation in California. The terms of the settlement are set forth below.

II

STIPULATION

1. The western boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation shall be the boundary, as resurveyed by the Bureau of Land Management in 1975 (copy attached), that locates the western boundary of the Hay and Wood Reserve to conform to the acreage description of 9,114 acres in the Executive Orders of March 30, 1870, and September 19,

1890, all in accordance with the June 3, 1974 Order of the Secretary of the Interior, subject to the following conditions:

(a) The parties agree that the Court shall make no finding or conclusion regarding the validity, correctness, or propriety of the Secretary's Order of June 3, 1974. For the limited purpose of determining title to or jurisdiction over the last natural bed of the Colorado River, the States of California and Arizona expressly reserve the right to challenge the validity, correctness, and propriety of such order in any future proceeding to determine title to or jurisdiction over the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve portion of the Reservation as described above. The United States and the Tribe reserve any and all defenses they may have, including, but not limited, to exhaustion of administrative remedies and lack of subject matter jurisdiction, in the event the Secretary's June 3, 1974 Order is challenged.

(b) Nothing in this Stipulation is intended or shall be construed to determine title to or jurisdiction over the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve portion of the Reservation as described above and no inference is to be drawn from the fact that the exterior boundaries agreed to in this Stipulation include the last natural bed of the Colorado River.

(c) The States of Arizona and California expressly reserve their claims to title to and jurisdiction

over the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve portion of the Reservation as described above, and for the limited purpose of determining title to or jurisdiction over the last natural bed of the Colorado River, the parties expressly reserve any and all arguments in support thereof, including but not limited to:

(i) That the western boundary of the Hay and Wood Reserve was located on the east bank of the Colorado River when it was created by Executive Order on March 30, 1870, when the Hay and Wood Reserve was transferred to the Secretary of the Interior for Indian school purposes by Executive Order on September 19, 1890, and at all times thereafter.

(ii) That the United States lacked the authority and intent to make the riverbed part of the lands set aside as the Hay and Wood Reserve when it was created by Executive Order on March 30, 1870, when it was transferred to the Secretary of the Interior for Indian school purposes by Executive Order on September 19, 1890, and at all times thereafter.

(d) The United States and the Tribe expressly reserve their claim to the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood

Reserve portion of the Reservation as described above, and their respective arguments in support thereof.

(e) Nothing in this Stipulation shall be construed to determine the legal validity of the respective arguments of either the States of Arizona and California or the United States and the Tribe. This Stipulation shall not be construed as a waiver of immunity or subject matter jurisdiction by the United States or the Tribe.

(f) Notwithstanding the foregoing, it is agreed by and between the parties that any judicial determination of title to or jurisdiction over the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve portion of the Reservation as described above shall not affect the agreement of the parties herein concerning the location of the boundary of the Hay and Wood Reserve portion of the Reservation or the Tribes water rights as described in paragraphs 2 and 3 below.

2. Except as provided in paragraph 3 of this stipulation and agreement the Tribe's present perfected water rights for its California lands as set forth in the 1964 Decree in **Arizona v. California**, 376 U.S. 340 (1964), the 1979 Supplemental Decree, 439 U.S. 419 (1979) and the 1984 Second Supplemental Decree, 466 U.S. 144 (1984), shall remain undisturbed and shall not be affected in any manner by the terms of this Stipulation and Agreement.

3. In addition to amounts decreed to the Tribe as described in paragraph F of the recitals hereto, the Tribe shall be entitled to an annual (calendar year) quantity not to exceed (a) 3,022 acre feet of diversions from the mainstream or (b) the

amount of water necessary to supply the consumptive use required for irrigation of 468 acres, and for the satisfaction of related uses, whichever of (a) or (b) is less, for the Hay and Wood Reserve portion of the Reservation in California located west of the 1928 Blout Survey, with a priority date of September 19, 1890. The parties agree that this additional allocation for lands in California shall be included in a supplemental decree to be issued by the Supreme Court at the conclusion of the present proceedings with a priority date of September 19, 1890 and subject to the same terms and conditions as apply to the water rights previously decreed to the Tribe.

4. The State Parties shall not object to the use of the additional allocation of water as provided for herein on the Fort Mojave Indian Reservation lands in California under the terms set forth in the 1964, 1979, and 1984 decrees in **Arizona v. California** during the period from the date of this Stipulation and Agreement to the date of the issuance of a supplemental decree by the Supreme Court as it relates to this dispute.

5. The Tribe and/or the United States on behalf of the Tribe shall not claim or be entitled to any additional Colorado River water rights for existing trust or allotted lands presently claimed as lands within the disputed boundaries of the Hay and Wood portion of the Reservation in California.

6. The Tribe waives and abandons all claims to additional water it may have as a result of disputed boundaries of the Intermediate Tract portion of the Reservation in California. This waiver does not include any claims to additional water the Tribe may have in the Intermediate Tract portion of the Reservation in Arizona, and the State of Arizona

does not waive any defenses it may have, including defenses based on res judicata, to any such claims. This waiver also does not include, and shall not extend to, any claim to title to any lands within the Intermediate Tract portion of the Reservation in either California or Arizona. The Tribe, the United States, and the States of California and Arizona, expressly reserve their claims to title to and jurisdiction over lands within the Intermediate Tract portion of the Reservation. Nothing in this Stipulation is intended or shall be construed to determine title to or jurisdiction over the lands within the Intermediate Tract portion of the Reservation.

7. The Tribe reserves the right to seek appropriate federal legislation confirming the boundaries of the Hay and Wood Reserve portion of the Reservation as agreed to by the parties in paragraph 1 of this Stipulation.

8. Nothing in this Stipulation and Agreement is intended or shall be construed (a) to affect any right, claim, or interest in lands of any person, natural, corporate or political, whether or not a party to this case, or (b) to determine title to or jurisdiction over any such land.

9. This Stipulation and Agreement merges all prior negotiations and understandings between the parties, contains their entire agreement and shall be effective upon execution by all parties. It represents a negotiated settlement with respect to all matters at issue between the parties in the proceeding now before the Supreme Court and does not constitute any judicial finding or determination of any such issue. No party shall (a) be deemed to have approved, accepted, agreed to or consented to any particular concept, principle or argument with regard to such

matters, or (b) be prejudiced as to any contention which they may offer in the future with regard to such matters in any disputes among themselves or with third parties.

10. Waiver. Nothing in this Agreement shall be deemed to create or give validity to any claim by the Tribe against the United States or in any way constitute acknowledgment of the validity of any claims by the Tribe against the United States. In addition, the Tribe hereby waives any claim against the United States arising out of:

(a) the negotiation of this Agreement;

(b) the adoption of the specific terms of this Agreement; or

(c) allegations concerning the lack of authority of the Tribe to enter into this Agreement.

DATED this 14th day January, 1998.

FORT MOJAVE INDIAN TRIBE

By _____

Its Chairperson

THE UNITED STATES OF AMERICA

By _____

Its Trial Attorney

THE STATE OF CALIFORNIA

By _____

Its _____

THE STATE OF ARIZONA

By _____

Its _____

COACHELLA VALLEY WATER DISTRICT

By _____

Its _____

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

By _____

Its _____

KLT:gld/agrmts/stip.avc

No. 8, Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, *et al.*,

JOINT MOTION TO APPROVE STIPULATION AND AGREEMENT

The Colorado River Indian Tribes, the United States, the State of California, The Metropolitan Water District of Southern California and the Coachella Valley Water District (referred to jointly as "the settling parties") respectfully move the Special Master to (1) recommend to the Supreme Court that it approve the Stipulation and Agreement which is Attachment 1 to the Joint Motion to Approve Stipulation and Agreement, and (2) issue a report containing his recommendations. The grounds for this motion are described in the accompanying memorandum in support.

Dated: March 4, 1999

Respectfully submitted,

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By: _____
Scott B. McElroy

CERTIFICATE OF SERVICE

I certify that I have placed a true and correct copy of the foregoing Joint Motion to Approve Stipulation and Agreement in the U.S. mail, postage prepaid, this 4 day of March, 1999, to the following:

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STIPULATION AND AGREEMENT

The Colorado River Indian Tribes ("Tribes"), the United States of America ("United States"), the State of California, the Metropolitan Water District of Southern California ("Metropolitan"), and the Coachella Valley Water District ("Coachella") (referred to collectively as the "State Parties"), hereby enter into the following Stipulation and Agreement.

I

RECITALS

1. On October 10, 1989, the United States Supreme Court granted the State Parties' motion to reopen the decree in Arizona v. California, 373 U.S. 546 (1963) ("Arizona v. California I") to determine disputed boundary claims with respect to the Colorado River, Fort Mojave and Fort Yuma Indian reservations. 493 U.S. 886 (1989) ("Arizona v. California III").

2. The boundary issue concerning the Colorado River Indian Reservation ("Reservation") involves the water rights related to lands affected by the location of a portion of the western boundary of the Reservation in California. Although the controversy has also engendered litigation and uncertainty as to the legal status of the federal lands in the disputed area and ownership of the western half of the bed of the Colorado River within the Reservation, this settlement addresses only the issue of water rights.

3. The same boundary issue was presented to the Supreme Court in Arizona v. California I and 20 years later in Arizona v. California II, 460 U.S. 605 (1983), but was not resolved. Similarly, an action by Metropolitan and Coachella instituted in the United States District Court for the Southern District of California to resolve the boundary dispute was dismissed on sovereign immunity grounds. Metropolitan Water Dist. v. United States, 628 F Supp. 1018 (S.D. Cal. 1986), dismissed, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court sub nom. California v. United States, 490 U.S. 920 (1989).

4. In order to resolve the water rights issues referenced above, the United States, the Tribes and the State Parties have reached the agreement set forth below.

II

STIPULATION

A. Purpose. This Stipulation and Agreement settles all matters now at issue between the parties in this litigation with respect to Reservation water rights. Except as expressly provided herein, no modification of this Stipulation and Agreement without the consent of the parties shall be effective.

B. Water Rights. (1) In addition to the water rights decreed to the United States for the benefit of the Tribes in Arizona v. California I, the Tribes shall be entitled to an annual (calendar year) quantity not to exceed: (i) 2100 acre feet of diversions from the mainstream of the Colorado River; or (ii) the amount of water necessary to supply the consumptive use required for irrigation of 315 acres and for the satisfaction of related uses,

whichever of (i) or (ii) is less. The parties agree that this additional allocation shall be included in a supplemental decree to be issued by the Supreme Court at the conclusion of the present proceedings with a priority date of May 15, 1876 and subject to the same terms and conditions as apply to the water rights previously decreed to the United States for the benefit of the Tribes.

(2) Except as provided herein, the Tribes' present perfected water rights for its California lands as set forth in the 1964 Arizona v. California I Decree, 376 U.S. 340 (1964), the 1979 Supplemental Decree, 439 U.S. 419 (1979), and the 1984 Second Supplemental Decree in Arizona v. California II, 466 U.S. 144 (1984), shall remain undisturbed and shall not be affected in any manner.

(3) The State Parties shall not object to the use of the additional allocation of water provided for herein on the Reservation lands in the State of California, under the terms set forth in the 1964, 1979, and 1984 decrees in Arizona v. California during the period from the date of this Stipulation and Agreement to the date of the issuance of a supplemental decree by the Supreme Court as it relates to this dispute.

(4) The Tribes and/or the United States on behalf of the Tribes shall not claim or be entitled to any additional reserved water rights from the Colorado River for lands in the State of California other than those rights set forth in this Stipulation and Agreement and the prior decrees in Arizona v. California.

C. Disputed Boundary. The parties agree not to seek adjudication in this phase of

the litigation of the validity, correctness, or propriety of the January 17, 1969 Order of the Secretary of the Interior, Western boundary of the Colorado River Indian Reservation from the top of Riverside Mtn., Cal., through section 12, T. 5 S., R. 23 E., S.B.M., Cal., No. 90-1-5-668, 41-54 (1969 Secretarial Order). The United States and the Tribes, but not the other parties to this Stipulation and Agreement, agree that the lands described in the 1969 Secretarial Order, are included within the Reservation set aside by the Executive Order of May 15, 1876 and are held in trust by the United States for the benefit of the Tribes. The State of California disagrees, and expressly reserves the right to challenge the validity, correctness, and propriety of the 1969 Secretarial Order. The United States and the Tribes reserve any and all defenses they may have, including, but not limited to, exhaustion of administrative remedies and lack of subject matter jurisdiction, in the event the 1969 Secretarial Order is challenged.

D. Riverbed Lands. The State of California expressly reserves its claims to title to and jurisdiction over the bed of the Colorado River within the Reservation, and its respective arguments in support thereof. The United States and the Tribes expressly reserve their claim to title to and jurisdiction over the bed of the Colorado River within the Reservation, and their respective arguments in support thereof.

E. West Bank Homeowners Association. The State Parties agree to recommend to the Special Master in this proceeding that counsel for the West Bank Homeowners Association be permitted to file an amicus brief with the Special Master regarding this

agreement. The parties (1) reserve all arguments in opposition to the Association's interest in this proceeding and the right to file a brief in response to such amicus brief and (2) do not consent to, and reserve the right to object to, the filing of a Pro Se pleading by anyone.

F. Effect of Special Master's Boundary Opinions. It is the understanding and intent of the parties that, because the opinions issued by the Special Master in this litigation respecting the Colorado River Indian Reservation have not been reviewed by the Supreme Court, those opinions shall have no precedential or preclusive effect in any future litigation among the parties.

G. Scope and Effective Date. This Stipulation and Agreement merges all prior negotiations and understandings between the parties, contains their entire agreement and shall be effective upon unqualified recommended approval by the Special Master in his report to the United States Supreme Court in these proceedings and the Court's unqualified approval of the Special Master's report on this issue and the issuance of an appropriate decree.

H. Waiver. Nothing in this Stipulation and Agreement shall be deemed to create or give validity to any claim by the Tribes against the United States or in any way constitute acknowledgment of the validity of any claims by the Tribes against the United States. In addition, the Tribes hereby waive any claim against the United States arising out of:

(a) the negotiation of this Stipulation and Agreement;

(b) the adoption of the specific terms of this Stipulation and Agreement; or

(c) allegations concerning the lack of authority of the Tribes to enter into this Stipulation and Agreement.

This Stipulation and Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the parties to the aggregate counterparts had signed the same instrument. Signature pages of this Stipulation and Agreement may be detached from any counterpart of this Stipulation and Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Stipulation and Agreement identical in form hereto but having attached to it one or more additional signature pages.

The parties hereto have executed this Stipulation and Agreement on the date set forth to the left of their signatures.

COLORADO RIVER INDIAN TRIBES

Date: Feb. 23, 1999 By _____

Its Chairman

THE UNITED STATES OF AMERICA

Date: 2/16/99 By _____

Its Trial Attorney

THE STATE OF CALIFORNIA
BILL LOCKYER
Attorney General
DOUGLAS B. NOBLE
NANCY ALVARADO SAGGESE
Deputy Attorneys General

Date: _____ By _____

By _____

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Date: 5/ '99 By _____

Its Assistant General Counsel

COACHELLA VALLEY WATER DISTRICT

Date: _____ By _____

Its _____

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Date: _____ By _____

Its _____

COACHELLA VALLEY WATER DISTRICT

Date: January 20, 1999 By Steven B. Abbott
STEVEN B. ABBOTT
REDWINE AND SHERRILL

Its Attorney

No. 8, Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, *et al.*,

MEMORANDUM IN SUPPORT OF JOINT MOTION TO RECOMMEND APPROVAL OF STIPULATION AND AGREEMENT

The Colorado River Indian Tribes, the United States, the State of California, The Metropolitan Water District of Southern California, and the Coachella Valley Water District (referred to jointly as "the settling parties") respectfully request the Special Master to (1) recommend to the Supreme Court that it approve the Stipulation and Agreement which is Attachment 1 to the Joint Motion to Approve Stipulation and Agreement, and (2) issue a report and proposed decree containing his recommendations.[1] In support of their motion, the settling parties provide the following comments.

[1/]The proposed form of Decree, which the settling parties anticpiate filing with the Special Master within 30 days will include the recommendations set forth in the Joint Motion to Approve Settlement Agreement (March 4, 1998) related to the Fort Mojave Reservation. In the interim, the Special Master does not need to delay requesting comments on both agreements.

I. BACKGROUND

The present proceedings stem from the Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) which, among other things, raised the question of whether the Colorado River Indian Tribes ("Tribes") are entitled to additional water rights for lands which the Department of the Interior, in 1969, recognized as part of the Colorado River Indian Reservation ("disputed lands"). See 1969 Order of the Secretary of the Interior, Western Boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, Cal., through section 12, T. 5 S., R. 23 E., S.B.M., Cal., No. 90-1-5-668 (41-54) (Dep't Interior Jan. 17, 1969) ("1969 Secretarial Order"). In the course of addressing the issue of water rights for the disputed lands before the Special Master, the parties have discussed questions related to the proper location of the Colorado River Indian Reservation ("Reservation") western boundary (which in turn raises issues of the extent of tribal, federal, and state jurisdiction over the disputed lands) and the ownership of the west half of the bed of the Colorado River, as well as a host of other issues. The Special Master has issued opinions which do not recognize any additional water rights for the disputed lands for use by the Tribes.

However, the settling parties have agreed on a settlement of the matter that resolves the water rights issues that are before the Master. See Stipulation and Agreement ("Agreement"). Except as between the United States and the Tribes, the issue of the question of the proper location of the Reservation boundary is not addressed by the Agreement. Likewise, the Agreement does not address the ownership of the west half of the bed of the Colorado River. The parties reserve all arguments regarding such matters. The Agreement is submitted to the

Master for his review in order that he include a recommendation for its approval in his report to the Court. The settling parties anticipate that the West Bank Homeowners Association, which unsuccessfully sought to intervene in the litigation, may attempt to object to the Agreement. See *Memorandum Opinion and Order No. 17* (Mar. 29, 1995) (denying Motion to Intervene). Upon the Master's completion of the preparation of a proposed decree and a final report, the matter will be ripe for submission to the Supreme Court.

II. THE NATURE OF THE AGREEMENT

The Agreement is straightforward. In order to facilitate the approval process, the settling parties here briefly describe its terms.[2]

1. The Tribes would obtain an additional 2,100 acre feet of water per year, subject to the same terms and conditions that apply to the Tribes' existing water rights. (¶ B). The Tribes would also agree not to claim any additional reserved water rights in California. These provisions are enforceable before the Supreme Court. The Tribes' existing rights would not be affected.

2. The State, The Metropolitan Water District of Southern California, and the Coachella Valley Water District agree not to object to the West Bank Homeowners Association filing an amicus brief opposing the settlement before the Special Master. (¶ E). The Tribes and the United States are not part of this agreement.

3. The settling parties reserve their respective positions with regard to the location of the Reservation boundary and title to the west half of the bed of the Colorado River. (¶¶ C, D).

[2/] In the event of a dispute over the meaning of the Stipulation and Agreement, the language of the Agreement would govern rather than this explanation.

4. The Master's opinions and reports would have no precedential or preclusive effect among the parties. (¶ F).

5. The Tribes would waive whatever rights exist to sue the United States for executing the Agreement and the accompanying documents.

6. The Agreement is contingent on the Court's unqualified approval of a report by the Master that contains an unqualified recommendation of approval of the Agreement.

III. CONCLUSION

The settling parties have worked diligently to resolve the water rights issues in this litigation. In resolving those issues, the settling parties have carefully avoided the peripheral issues. The Agreement is an appropriate resolution of the water rights issues presented in this dispute and should be approved.

Dated: June 4, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have placed a true and correct copy of the foregoing in the U.S. mail, postage prepaid, this Memorandum in Support of Joint Motion to Recommend Approval of Stipulation and Agreement this 4 day of March, 1999, to the following:

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April 22, 1999

Frank McGarr, Special Master
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Dear Special Master McGarr:

Re: Arizona v. California, No. 8, Original (Colorado River Indian Reservation

This constitutes a joint response on behalf of the settlement parties to your letter of April 6, 1999, expressing concern about the proposed settlement of the claim of the Colorado River Indian Tribes for additional Colorado River water rights in California.[1] You are quite right that the dispute has historically been referred to as a "boundary dispute." Although the State Parties used that characterization in their motion to reopen the Arizona v. California decree which initiated the current proceedings, they stated that resolution of the dispute was "necessary in order to finally establish [the Tribes'] water entitlements.[2] The United States' response pointed out that "a judicial resolution [of the boundary disputes] is sought *only* for the purpose of finally quantifying the [reservation's] water rights."[3] The present proceedings were seen as a pragmatic way to resolve the boundary dispute for water rights purposes only because the State Parties' independent district court action to resolve the dispute had been frustrated on sovereign

---

[1] Although we do not read your letter as applying to the Fort Mojave settlement because it included an agreement by the parties as to the disputed boundary and no boundary rulings were made in these proceedings, these comments apply to that settlement as well.

[2] Motion of the State Parties to Reopen Decree to Determine Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) at 2.

[3] Response of the United States (September 1989) at 4 (emphasis added).

immunity grounds[3] and the United States could not bring a traditional quiet title action against the State Parties because none of them claim title to the disputed area. U.S. Response at 5, n. 1.

The "boundary dispute" reference has always been "shorthand" for the Tribes' claim for additional water to meet the "reasonable needs" of the California portion of their reservation. This claim implicates the location of the western reservation boundary in California only because the "law of the case" in this interstate *water* dispute is that the Tribes' water rights are measured by the amount of water needed to irrigate the "practicably irrigable acreage" ("PIA") within the boundaries of their reservation. In short, but for the State Parties' objection to the Tribes' water rights claim for the disputed area, this matter would not be before the Special Master. The same result is produced by the proposed settlement, in that since the State Parties no longer object to the Tribes' substantially reduced water claim, there is no need to take the first step in adjudicating a disputed claim, as you correctly note in your letter, by determining whether the Tribes' claim is legally supportable.

In the original proceedings in Arizona I, all tribal water rights claims were adjudicated by the Supreme Court without any formal determination of their reservation boundaries. In particular, the water rights of the Fort Mojave and Colorado River reservations were adjudicated even though the underlying boundary disputes on those reservations were not resolved. The proposed Colorado River reservation settlement follows the same approach, in that the affected parties all have agreed that those Tribes shall be entitled to an additional allocation of water for general use in California. But the proposed settlement goes further than the Supreme Court's treatment of the two disputes in 1963, which left the door open for future claims by the Tribes regarding the disputed boundary areas, by barring any future claims by the Tribes under the reserved rights doctrine for additional water in California. Consequently, the present boundary dispute cannot resurface in the future in the context of a tribal water rights claim that has been the subject of this longstanding dispute. In short, the proposed settlement is a "final determination" of the boundary related water rights dispute that no longer requires resolution of the boundary location itself, with all its political jurisdiction and land title implications, which has become irrelevant to this interstate water dispute.

Moreover, just as the State Parties stipulated in the 1979 supplemental decree that the tribal allocations, although measured by PIA, could be used for any purpose on the reservations,[4] so can the present increased allocation to the tribes be used anywhere on the reservation. Indeed, inasmuch as the title to the so-called "disputed area" is either owned outright by the United States (and administered as public lands by the Bureau of Land Management) or held in trust for the Tribes (and administered by the Tribes under the supervision of the Bureau of Indian Affairs), Coachella and Metropolitan have also entered into a separate agreement not to contest its use by the Tribes on those lands, in recognition that non-Indian water rights will not be adversely affected by such use. Although the State of California has reserved the right to challenge the boundary location for other reasons, it holds no water rights that would be adversely affected.

---

[3] The Metropolitan Water District of Southern California v. United States, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court sub nom. California v. United States, 490 U.S. 920 (1989).

[4] Arizona v. California, 439 U.S. 419, 422(1979).

In conclusion, the settling parties are convinced that the proposed settlement will carry out the original purpose for reopening the decree for the resolution of the several disputed claims for additional water rights. Therefore we are optimistic that the Supreme Court will approve the proposed settlement, particularly since the Solicitor General supports it. Consequently, we urge the Special Master to approve it and send it to the Court.

Sincerely,

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cc: Scott McElroy, Esquire
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PER CURIAM

The Court having on _____ rendered its decision (1) regarding the exceptions to the Final Report of the Special Master herein with respect to the claim of the Fort Yuma (Quechan) Indian Tribe for an additional water allocation, (2) approving the settlement agreement among the State Parties, the Fort Mojave Indian Tribe and the United States, and (3) approving the settlement agreement among the State Parties, the Colorado River Indian Tribes and the United States, all as specified in the Court's opinion, __U.S. ___ ( ) the following supplemental decree is now entered to implement that decision.

SUPPLEMENTAL DECREE

It is ORDERED, ADJUDGED AND DECREED:

A. Paragraph (4) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U.S. 340, 344-45), is hereby amended to read as follows:

> (4)The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date.

B. Paragraph (5) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U.S. 340, 345) and supplemented on April 16, 1984 (466 U.S. 144, 145) , is hereby amended to read as follows:

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 132,789 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,544 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date.

C. Paragraph (5) of the introductory conditions to the Supplemental Decree in this case entered on January 9, 1979 (439 U.S. 419, 421-23) is hereby amended by adding the following exception at the end of the concluding proviso in the first sentence of that paragraph: "except for the western boundaries of the Fort Mojave and Colorado River Indian reservations in California."

D. Paragraph II(A)(24)of the Decree of January 9, 1979 (439 U.S. 419, 428) is hereby amended to read as follows:

(24) Colorado River Indian Reservation	10,745	1,612	Nov. 22, 1873
	40,241	6,037	Nov. 16, 1874
	5,860	879	May 15, 1876

E. Paragraph II(A)(25)of the Decree of January 9, 1979 (439 U.S. 419, 428) is hereby amended to read as follows:

(25) Fort Mojave Indian Reservation	16,720	2,587	Sept. 18, 1890

F. Except as otherwise provided herein, the Decree entered on March 9, 1964, and the Supplemental Decrees entered on January 9, 1979 and April 16, 1984, shall remain in full force and effect.

G. The Court shall retain jurisdiction herein to order such further proceedings and enter such supplemental decree as may be deemed appropriate.

Supreme Court, U.S.
FILED
DEC 20 1999
CLERK

No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

EXCEPTION BY STATE PARTIES TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

[Names Of Counsel Appear on Inside Front Cover]

December 20, 1999

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No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

STATE PARTIES' STATEMENT OF EXCEPTION TO REPORT OF SPECIAL MASTER

The State of Arizona, the State of California, Coachella Valley Water District, and The Metropolitan Water District of Southern California (hereafter "State Parties") submit this exception to that portion of the Report of Special Master Frank McGarr dated July 28, 1999, *i.e.*, Memorandum Opinion and Order No. 4 (September 6, 1991) (Rep. App. 2A) at pages 6-7, which rejects the State Parties' contention that the claims of the United States and Quechan Indian Tribe for water rights for certain disputed "boundary lands" allegedly part of the Fort Yuma ("Quechan") Indian Reservation, but not claimed in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), may not be asserted in this proceeding because of the "finality

principles" applied by this Court in rejecting similar "omitted lands" claims in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"). The grounds for this exception are set forth in the following supporting brief.

STATE PARTIES' BRIEF IN SUPPORT OF EXCEPTION

I. INTRODUCTION

This dispute involves the questions of (1) whether some 25,000 acres of land in the vicinity of the Fort Yuma ("Quechan") Indian Reservation ("FYIR") in California ("disputed boundary lands") are part of that reservation[1] and (2) if so, whether approximately 52,000 acre feet of additional reserved water rights should be allocated annually to the FYIR for those lands beyond those awarded by the decision and decree in *Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964) ("*Arizona I*"), all of which would be senior to the rights of other California non-Indian holders of contractual Colorado River water rights, such as Coachella Valley Water District and The Metropolitan Water District of Southern California. The issue before the Court is whether the United States and the Quechan Indian Tribe ("Tribe") should be precluded from claiming additional water rights on either of two grounds: (1) no water rights claim was made for the disputed boundary lands by the United States in *Arizona I* and

---

[1]The underlying issue is whether the cession of the disputed lands by the Quechan Tribe to the United States in an 1893 agreement ratified by Congress in 1894 never became effective because of the Government's alleged failure to perform some of its obligations, as the United States and the Tribe contend, or whether the cession was immediately effective and the Tribe was relegated to a breach of contract/trust claim against the United States for the alleged failure to perform, as the State Parties contend. Because the Special Master found for the State Parties on their defense of the preclusive effect of a 1983 Court of Claims judgment, he did not take evidence or make findings and conclusions regarding this issue and it is not now before the Court. Further proceedings before the Special Master will be required in the event that neither of the grounds for the State Parties' preclusion defense are sustained.

is now barred by the "finality principles" applied by this Court to a similar claim for "omitted lands" in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"); and (2) the Tribe received $15 million in compensation from the United States for the taking of the disputed lands under a 1983 judgment of the Court of Claims. The Special Master held that the United States' and Tribe's claim was not precluded on the first ground, but was precluded on the second. The State Parties except to his ruling on the first ground.

II. BACKGROUND OF THE DISPUTE

A. The 1893 Agreement[2]

An executive order of January 9, 1884, established the Fort Yuma Indian Reservation in California for the Yuma (Quechan) Indians. By the Act of March 3, 1893, 27 Stat. 612, 633, Congress authorized the Secretary of the Interior ("Secretary") "to negotiate with any Indians for the surrender of portions of their respective reservations, any resulting agreement being subject to ratification by Congress." Later that year the Quechan Tribe petitioned the President and Congress to have their lands irrigated and offered to cede their rights in the reservation to the United States for settlement by non-Indians in return for allotments of irrigable land to individual Indians.

The Secretary appointed a commission which executed an agreement with the Tribe on December 4, 1893 ("1893 Agreement"). Article I of the 1893 Agreement provided that the Quechans "upon the conditions hereinafter expressed, do

[2]This background information is taken generally from Solicitor's Opinion M-36886, 84 I.D. ("Interior Decisions") 1 (1977) ("Austin Opinion").

hereby surrender and relinquish to the United States, all their right, title, claim and interest in and to and over" the Yuma Reservation. The remainder of the agreement set forth the obligations of the United States.[3] The 1893 Agreement was "accepted, ratified and confirmed" by Congress in section 17 of the Act of August 15, 1894, 28 Stat. 286, 332 ("1894 Act"). The 1894 Act also required the Colorado River Irrigation Company, which had been granted a right-of-way the previous year, to begin construction of an irrigation canal within three years or forfeit the right-of-way. It also provided that "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws." *Id.* at 336.

The irrigation company never constructed the proposed canal. However, in 1904 Congress authorized the Secretary to serve the Quechan irrigable lands as a part of any reclamation project for that area. 33 Stat. 189, 224. Initial diversion and distribution works were completed by 1904 and water was delivered to the unallotted Quechan irrigable lands in 1910. Disposal of those lands began in that year. In 1911 Congress increased the allotment to individual Indians from 5 to 10 acres. 36 Stat. 1059, 1063. In 1912, 8,110 acres in the western part of the irrigable area were allotted to the Quechans. The distribution system for that area was substantially completed by 1915 and water deliveries began a few years later. The non-irrigable lands have never been opened to settlement and sale.

[3]If the Government's obligations represent " 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,' a 'nearly conclusive' or 'almost insurmountable' presumption of diminishment arises." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998).

As a result of a dispute over the status of the non-irrigable lands between the Bureau of Reclamation and the Bureau of Indian Affairs in 1935, Secretary Ickes requested an opinion on the matter from his Solicitor. On January 8, 1936, Solicitor Margold held that the 1893 Agreement, as ratified by the 1894 Act, extinguished the Tribe's title to certain non-irrigable lands, which are the lands currently in dispute.[4] In 1951 the Tribe filed a "Petition for Loss of Reservation" with the Indian Claims Commission asserting a claim for money damages arising "from the expropriation by the United States of the greater part "of the Tribe's 1884 reservation (p. 3, ¶6), which claim included the disputed boundary lands. *Quechan Tribe of the Fort Yuma Reservation, California v. United States* (Docket No. 320).[5]

B. The Proceedings in *Arizona I* (*Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964) (Decree))[6]

In 1952 Arizona filed a complaint with this Court to determine the respective rights of Arizona and California to the waters of the Lower Colorado River Basin. The United States intervened and asserted water rights for the Fort Yuma and

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[4]Solicitor's Opinion M-28198 (January 8, 1936) ("Margold Opinion"). The opinion is set out in *Hearings on Oversight on Quechan Land Issue Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 94th Cong., 2d Sess. 69 (1976) (hereafter "*Quechan Hearings*").

[5]The Tribe's petition is included in a group of Claims Court documents which accompanied the "Brief for State Parties on Pretrial Issues" (April 15, 1991) before the Special Master.

[6]The proceedings in *Arizona I* are summarized in *Arizona II*, 460 U.S. at 607-11.

other Indian reservations. It claimed enough unappropriated water to meet the "reasonable needs" of the Indians of each reservation measured by the water requirements of the "practicably irrigable acreage" within each reservation and with priorities dating from the creation of each reservation. This measurement standard necessarily made the accurate determination of each reservation's boundaries an important threshold issue. The United States introduced maps for each reservation showing its boundaries and the location of historically irrigated acreage plus lands that were considered to be "practicably irrigable." The maps of the FYIR conformed with official maps of the reservation reflecting the boundaries as determined by the 1936 Margold Opinion.

Counsel for the United States (Mr. Warner) made it clear, in response to questioning by Special Master Simon Rifkind, that the maps evidenced the United States' *maximum* claim for each reservation (*Arizona I* Tr. 12,461, 14,153-54):

> THE MASTER: I take it from what you have just said that you are going to assert a claim for the maximum amount of water necessary for the irrigable acres in the reservation.
>
> MR. WARNER: That is correct, Your Honor.
>
> * * *
>
> MR. ELY [Counsel for California]: . . . What I am now trying to find out is whether we may rely upon these lands on these maps as limiting that claim or not.
>
> THE MASTER: Is this a Bill of Particulars of that claim, is what you want to know?

MR. ELY: Yes, sir.

* * *

THE MASTER: Is it, Mr. Warner?

MR. WARNER: The testimony--

THE MASTER: No; the maps.

MR. WARNER: --as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case.

The Special Master had earlier admonished Mr. Warner as to the possible preclusive effect of not asserting and proving all possible federal claims (*id.* at 11,282, 11283-84 (emphasis added)):

> THE MASTER: You see, when you quiet title, that is precisely what you do. You enter a decree against the world, and that is the peculiarity of an action to quiet title, which I understand you invoked. You said that you were a plaintiff in this court, asking the Court to quiet your title to 28 reservation claims, and so forth. In an action or a decree quieting title, you cut out all claims not asserted. That is precisely the point; and therefore, it is not easy to accept your suggestion that it is not the function of the Court to reject all claims not asserted.
>
> * * *

> *I just want you to be aware of the fact that the mere fact that it has not been asserted does not mean that you may not lose it*, because the decree here is supposed to dispose of all of the waters, and all of the claims thereto of the river and all its tributaries. That is what the ideal function of this decree would be. I don't know whether it will succeed in that, but that is what we are supposed to be aiming for in an action to quiet title.

Mr. Warner subsequently assured the Special Master that "I think it is our duty to prove the Indian claims to the full extent we can prove them." *Id.* at 12564.

The Government's understanding that the 1936 Margold Opinion was a controlling determination of the reservation boundary was reflected in its proposed findings and conclusions for the FYIR, which described the 1893 Agreement as follows:[7]

> On December 4, 1893, an agreement was entered into between the United States and the Yuma Indians by which said Indians surrendered to the United States all their right, title, claim and interest in the Reservation established by Executive Order of January 9, 1884, for them and such other Indians as the Secretary might see fit to settle thereon.

No existing or potential boundary issues on the FYIR were called to the Special Master's attention.

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[7]Findings of Fact and Conclusions of Law Proposed by the United States of America (April 1, 1959) Finding 4.8.3, p. 83, quoted in *Quechan Hearings*, n. 4 *supra* at 190.

Special Master Rifkind's report recommended awarding the United States the full amount of its claim for the FYIR,[8] and that recommendation was adopted by the Court in its 1963 decision (373 U.S. at 595-601) and the 1964 Decree. 376 U.S. at 344. The decree reserved no boundary issues on the Reservation for possible future determination, as it did with respect to the Fort Mojave and Colorado River reservations. 376 U.S. at 344-45.

C. The 1979 Supplemental Decree (*Arizona v. California*, 439 U.S. 419 (1979))

Article II(d)(5) of the 1964 Decree required the parties to furnish the Court a list of present perfected rights.[9] The State Parties and the United States subsequently engaged in extensive negotiations extending into the mid-1970's regarding the extent

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[8]Report of Special Master Simon H. Rifkind (December 5, 1960) at 268-69.

[9]A perfected right was defined as:

> ". . . a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use."

376 U.S. 340, 341 (1964).

Present perfected rights were defined as:

> "perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Id.*

and priorities of such rights, which resulted in a stalemate described to the Court by the State Parties in 1977 as follows:[10]

> In response to the United States' concern and request, the concerned State parties agreed to subordinate all their major present perfected rights regardless of priority date to those of the Indian tribes. The Indian rights to be so advantaged were to include not only those already decreed by this Court, *but also such additional present perfected rights as were thereafter established by decree or future stipulation that were based upon orders of the Secretary of the Interior enlarging boundaries of the Indian reservations listed in Article II(D) of the Decree in this case that had occurred since the date of said Decree and prior to submission of the stipulation.* A new stipulation was drafted by the concerned State parties which those parties believed would satisfy all of the conditions of the United States. *The United States then demanded the further condition that all parties would agree to additional quantified Indian water rights based on said boundary enlargements whether or not said secretarial orders proved to be legally valid.*
>
> *The concerned State parties rejected this additional demand. . . .*

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[10]Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree (April 29, 1977, May 2, 1977) at 24 (emphasis added, footnote omitted).

The United States proposed the following language regarding adjustments to present perfected rights for Indian reservations resulting from final boundary determinations:[11]

> [T]he quantities fixed in paragraphs (1) through (5) of Article II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event that the boundaries of the respective reservations are finally determined.*

The State Parties agreed to the United States' proposed boundary language and it was included in a joint motion for entry of a stipulated supplemental decree filed by all parties,[12] which the Court entered on January 9, 1979 ("1979 Decree"). 439 U.S. 419, 421 (1979).

D. The Proceedings Before the Secretary of the Interior Regarding the Disputed FYIR Boundary Lands[13]

In 1968, while the present perfected rights negotiations were going on, Solicitor Weinberg affirmed the Margold Opinion, noting the Tribe's action for compensation pending

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[11]Response of the United States to the Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree (November 1977) at 2-3 (emphasis added).

[12]Joint Motion for the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree (May 26, 1978) at 5.

[13]The history of the proceedings before the Secretary through June 24, 1976 is set out in *Quechan Hearings*, n. 4 *supra*.

before the Indian Claims Commission.[14] The Tribe subsequently petitioned the Secretary to reverse the Margold Opinion, and a draft Solicitor's opinion that would have done so was near approval when the State Parties learned of it and were granted the opportunity to review and comment on it. After extensive briefing and two days of oral argument before Secretary Kleppe and Solicitor Austin, Solicitor Austin informed the Tribe by letter of February 2, 1976 that he found no basis to overturn the Margold Opinion[15] and subsequently prepared a formal opinion affirming that opinion (n. 2 *supra*).

With the advent of the Carter Administration, the Tribe requested Secretary Andrus to review the dispute. On December 20, 1978, without giving the State Parties an opportunity to be heard again, Solicitor Krulitz issued an opinion reversing the Austin Opinion and holding that the Tribe's cession of its lands under the 1893 Agreement had never become effective because the conditions in the Agreement had not occurred. 86 I.D. 3. That same day Secretary Andrus issued an order revising the boundaries of the FYIR to reflect the rationale of the Krulitz Opinion.[16]

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[14]Memorandum from the Solicitor to the Secretary of the Interior (June 12, 1968) quoted in *Quechan Hearings*, n. 4 *supra* at 68.

[15]*Quechan Hearings, n. 4 supra* at 124.

[16]See *Arizona II*, 460 U.S. at 632-633; *see also Quechan Indian Reservation Boundaries; Secretarial Determination and Directives*, 46 *Fed. Reg.* 11372 (1981).

E. The Proceedings in *Arizona II* (*Arizona v. California*, 460 U.S. 605 (1983), 466 U.S. 144 (1984) (Decree))

On December 22, 1978 the United States moved to modify the 1964 Decree to obtain water rights for certain Indian "omitted" and "boundary" lands.[17] Acknowledging that Article II(D)(5) only provided for subsequent adjustment as a result of final boundary determinations on the Colorado River and Fort Mojave reservations, the United States argued that "fundamental equitable principles require that the same rule apply to the other Reservations whose boundaries likewise have been finally determined to include acreage *not known to be encompassed in 1964*" and that this principle "appears to be agreed on all sides and is, indeed, expressly contemplated by the Supplemental Decree proposed by the State Parties." *Id.* at 12 (emphasis added). Consequently, it sought to increase the FYIR's allocation to provide additional water for the practicably irrigable lands added by Secretary Andrus' order. The State Parties responded that there had been no final determination of any of the various boundary disputes and asked the Court to address them.[18]

The matter was referred to Special Master Elbert P. Tuttle, whose final report concluded that the boundaries of the Fort Mojave, Colorado River and Fort Yuma reservations had

[17]Motion of the United States for Modification of Decree and Supporting Memorandum (December, 1978) at 6. The United States sought water for "boundary lands" for which water had not been allocated in the original proceeding and for "omitted lands" that had not been considered to be practicably irrigable in the original proceeding.

[18]Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree (February 14, 1979) at 22-25.

been "finally determined" and declined to review the validity of those determinations.[19]

The Court rejected Special Master Tuttle's acceptance of the Secretarial orders on the Fort Mojave, Colorado River and Fort Yuma reservations as final determinations, but did accept several post-1964 court decrees and an act of Congress affecting the Fort Mojave and Cocopah reservations as final determinations. *Arizona v. California*, 460 U.S. 605, 636, 640-41 (1983). The Court's decision explained the effect of the 1979 Decree as follows (*id.* at 634 (emphasis added)):

> Our Supplemental Decree of 1979 did not . . . resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for *possible* adjustments with respect to the Colorado River and Fort Mojave Reservations, but *it also left open the issues about the boundaries of the other reservations.*
> . . .

The 1984 Supplemental Decree revised Article II(D)(5) as follows (466 U.S. 144, 145, emphasis added):

> [T]he quantities fixed in this paragraph [Fort Mojave] and in paragraphs 1 [Chemehuevi], 2 [Cocopah], 3 [Fort Yuma], and 4 [Colorado River] shall be subject to appropriate adjustments by agreement or decree of this Court *in the event that the boundaries of the respective reservations are finally determined.*

[19]Report of Special Master Elbert P. Tuttle (February 22, 1982) at 55.

F. The Current Proceedings ("*Arizona III*")

The State Parties' July 19, 1989 motion to reopen the decree to determine the disputed boundaries on the Fort Mojave, Colorado River and Fort Yuma reservations specifically raised the Fort Yuma preclusion issue for the first time before this Court.[20] Although the State Parties had not asserted a preclusion defense against the Quechan claim in *Arizona II*, the propriety of that defense had been made clear by the Court's "omitted lands" decision in *Arizona II* and the Court's subsequent enunciation of the preclusive effect of water decrees on unasserted Indian water rights in *Nevada v. United States*, 463 U.S. 110, 129-130 (1983). The United States and the Tribes did not oppose the motion, but the Tribes disputed the State Parties' suggestion that the Fort Yuma claim might be barred by *res judicata*:[21]

> There is no *res judicata* bar with respect to the Fort Yuma (Quechan) boundary. This Court's 1979 Supplemental Decree - to which the State Parties agreed - expressly provided that the water allocations for use on all the Reservations, including those for the Fort Yuma Reservation, are subject to adjustment "in the event that the boundaries of the respective

[20]Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) at 1-2.

[21]Response of the Tribes to the Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations (September 1, 1989) at 3-4 (footnote omitted).

> reservations are finally determined." 439 U.S. at 421.

Before Special Master Frank McGarr the State Parties contended that the water claim for the disputed boundary lands was precluded by (1) the finality principles applied to "omitted lands" in *Arizona II* and (2) a 1983 Claims Court judgment on the Tribe's long pending claim against the United States for compensation based on the 1893 agreement (page 6 *supra*). The United States and the Tribe claimed that, whether or not the preclusion principles of *Arizona II* would otherwise apply to the failure of the United States to assert a claim for water for the disputed lands in *Arizona I*, the State Parties had waived that defense by (1) entering into the stipulated 1979 Supplemental Decree and (2) failing to assert it in *Arizona II*.

The State Parties responded that (1) the stipulated decree language only maintained the unresolved status of the boundary disputes on all five reservations, leaving their ultimate resolution, as well as any appropriate modifications of the 1964 water allocations, for another day and (2) their preclusion defense was not untimely.

The Special Master rejected the United States' and the Tribe's contentions that the State Parties' "finality principles" argument had been waived or was untimely, but nevertheless did not accept it, concluding that the Government could not have foreseen in *Arizona I* that the Margold Opinion would be overturned 40 years later:[22]

[22]Memorandum Opinion and Order No. 4 (September 6, 1991) at 6-7 (emphasis added).

The United States made no water rights claims in the 1964 decree because the United States necessarily relied on the 1935 [sic] Secretary of the Interior opinion, the decree that all Fort Yuma boundary lands had been ceded by the Quechan Tribe to the United States, which action foreclosed such claims and thus foreclosed any possibility that the United States, as trustee for the Quechan Tribe, could assert water rights claims on behalf of the Tribe, based on claimed Fort Yuma boundary lands. It had no other option. But it is clear that *the later Secretary of the Interior opinion arbitrarily changing this decision was a circumstance not known in 1964, thus constituting an exception to the application of the rule of res judicata.*

Characterizing it as a "close question," the Special Master held that:

> [t]he Tribe is not precluded from asserting water rights based on boundary land claims on [sic] this proceeding, because although the U.S. on behalf of the Tribe failed to assert such claims in the proceeding leading to the 1964 decree, a later and then unknown circumstance bars the application of the doctrine of *res judicata* to this issue.

III. ARGUMENT

A. The Court's Preclusion Rationale Concerning "Omitted Lands" in *Arizona II* is Equally Applicable to the FYIR "Boundary Lands" Claim

In *Arizona II* the Court rejected the Government's claims for water rights for "omitted lands" which allegedly were "practicably irrigable" at the time of *Arizona I*, but for which the Government intentionally chose not to seek water rights. It emphasized that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States" and "the strong interest in finality in this case." 460 U.S. at 620. It also recognized that not only did non-Indian water users in California and Arizona "predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocation cannot help but exacerbate potential water shortage problems for these projects and their states."[23]

Against that background, the Court held that although "the technical rules of preclusion are not strictly applicable . . . [because they] do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment . . . the principles upon which these rules are founded should inform our decision," which it summarized as follows: "[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Id.* at 619. Inasmuch as the 1964 Decree settled "the extent of

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[23] *Id.* at 621. Later that term the Court stressed that the "policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water [citing *Arizona II*]." *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983).

irrigable acreage within the uncontested boundaries of the reservations," the Court refused to reconsider issues that were ". . . fully and fairly litigated 20 years ago." *Id.* at 621. It also found that the Quechan and other Indian tribes were bound by the United States' representation of them in *Arizona I*. *Id.* at 626-27.

The principles that underlie the Court's "omitted lands" decision should also guide its decision on the FYIR "boundary lands" claim. Those principles preclude the consideration of *claims* that were *or could have been raised* in the earlier *Arizona I* proceeding. *Nevada v. United States*, 463 U.S. at 129-30. The boundaries of the FYIR had been administratively determined by the Secretary's approval of the Margold Opinion in 1936, presumably recognized as a "final determination" by the Tribe in light of its action seeking compensation before the Indian Claims Commission in 1951, adopted by the United States in presenting its water claim for the FYIR in *Arizona I*, and formed the basis for this Court's 1964 Decree. There is no question that, *based on known facts at the time*, the United States could have raised the FYIR "boundary lands" claim in *Arizona I*, as it did for the Fort Mojave and Colorado River reservations, but made a deliberate decision not to do so, just as it did with respect to the "omitted lands." Furthermore, the same representations that the United States made to Special Master Rifkind concerning the limits of its claims for the practicably irrigable acreage on each reservation (pages 7-9 *supra*), as to which the Court in *Arizona II* made particular reference (460 U.S. at 622 note 14), should also be read as a limitation on its claims as to the boundaries of each reservation. The dominant purpose underlying the Court's decision to avoid an open-ended decree with respect to Indian rights would plainly be frustrated if the United States could escape the finality of that litigation by Secretarial reversal of the 1936 Margold Opinion 40 years later based on a new legal theory.

B. The State Parties Did Not Waive Their Right to Raise a Preclusion Defense

1. The 1979 Supplemental Decree

The 1979 decree provided as follows (439 U.S. 419, 421, emphasis added):

> [T]he quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event* that the boundaries of the respective reservations are finally determined.

Nothing in Article II(D)(5) assumed that there would necessarily be a "final determination" of any of the disputed reservation boundaries, as the conditional "in the event" language makes clear. The State Parties' argument that Article II(D)(5) simply preserved the status quo regarding possible boundary disputes is consistent with the Court's interpretation of that article in *Arizona II* (460 U.S. at 634 (emphasis added)):

> Our Supplemental Decree of 1979 did not . . . resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for *possible* adjustments with respect to the Colorado River and Fort Mojave Reservations, but *it also left open the issues about the boundaries of the other reservations* . . . .

The Court's interpretation of the 1964 Decree, as amended by stipulation in 1979, recognized the lack of any certainty that the boundary disputes would necessarily *ever* be finally

determined, or, if any were, that such determinations would entitle a tribe to an automatic increase in its 1964 water allocation. Article II(D)(5) cannot be read as a waiver by the State Parties of any defenses they might assert in any of those boundary disputes, including the preclusion defense asserted here, especially in light of their earlier rejection of a Government proposal that they waive *all* defenses (pages 11-12 *supra*).

2. The background of the 1984 Supplemental Decree in *Arizona II* confirms the State Parties' construction of the 1979 Decree

The controversy between the United States and the State Parties over the framing of the decree to implement the Court's decision in *Arizona II* confirms our contention that the boundary language in the 1979 Decree was intended to be completely neutral as to the effect of any "possible" future "final determinations" of boundary disputes or "appropriate adjustments" to the water allocations in the 1964 Decree. Unlike the 1964 and 1979 decrees, which were stipulated, the 1984 Decree was vigorously contested both as to substance and form. The State Parties' proposed decree addressing boundary disputes was described to the Court as follows:[24]

> Except as expressly provided, it does not modify or amend those [1964 and 1979] decrees, nor does it attempt to provide how any boundary adjustments that may result from any future final determinations of disputed

[24]Proposed Decree of the State Parties and Motion for Comment Period (1983) at 1.

> boundaries may be reflected in those decrees.

The United States, on the other hand, argued that the "appropriate adjustment" language of the 1964 and 1979 decrees contemplated only "upward adjustments."[25] The State Parties forcefully resisted that "heads I win, tails you lose" proposal:[26]

> Now that the United States and the Tribes have reopened the question of proper boundaries, the State Parties must be allowed to assert *all of their claims and defenses as to those boundaries*.
>
> * * *
>
> The proposed Decree of the United States goes far beyond implementing this Court's opinion of March 30, 1983. It seriously distorts that opinion and attempts to usurp the State Parties' rights to litigate issues which have not yet been adjudicated. . . . In contrast, the proposed decree of the State Parties sets forth provisions which encompass only those issues actually ruled upon by the Court. *It appropriately leaves other important issues to a later date when they have been appropriately framed by boundary litigation elsewhere.*

[25]Decree Proposed by the United States and Memorandum in Support Thereof (September 1983) at 3-6.

[26]Comments on the Decree Proposed by the United States and Revised Decree Proposed by the State Parties 4 (November 10, 1983) at 4, 10 (emphasis added).

On February 23, 1984 the Clerk of the Court sent the parties a proposed Supplemental Decree, informing them that it "follows the style suggested by the United States but on matters of substance resolves differences in favor of the State Parties" and requesting their comments "as to form." The United States nevertheless submitted comments urging the Court to reconsider its decision to reject the United States' substantive proposals.[27] The Court declined to do so and treated the unresolved boundary questions in its decree of April 16, 1984 as follows (466 U.S. 144, 145):

> [T]he quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1, 2, 3, and 4 [the other four reservations] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Article D of the decree also provided that "except as otherwise provided herein," the 1964 and 1979 decrees remained "in full force and effect." *Id.* at 146.

C. The State Parties' Preclusion Defense is Not Untimely

The Federal Rules of Civil Procedure "may be taken as guides" in original actions in this Court. S.Ct. Rule 17. FRCP Rules 8(c), 12(b) and 15 provide that *res judicata* is an affirmative defense that should be raised in an answer or amendments thereto or is waived. Although the State Parties

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[27]Memorandum for the United States Respecting the Court's Proposed Supplemental Decree (March 1984).

did not raise a preclusion defense in their opposition to the United States' and the Tribe's 1978 motion to open the 1964 Decree, this Court could have done so *sua sponte*, inasmuch as a number of federal circuits have affirmed decisions where a preclusion defense was raised and sustained *sua sponte* by the trial court, a practice this Court has referred to with approval. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995); see also *Nixon v. United States*, 978 F.2d 1269, 1297 (D.C. Cir. 1992) (concurring opinion). Even if the Court's review of Special Master Tuttle's report in *Arizona II* could somehow be viewed as an "appellate proceeding," a number of circuits have also held it permissible for an appellate court to raise a preclusion defense *sua sponte* for the first time on appeal. See *Nixon*, *supra*, and cases cited; *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993); *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 329 (9th Cir. 1995). The rationale for this rule is articulated in *Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986), in which the Sixth Circuit aligned itself with those circuits which "regard the desirability of avoiding duplicative litigation as sufficiently compelling to permit the court to raise the defense *sua sponte*." *Id.* at 195 (citations omitted); *see also Lujan v. U.S. Dep't of the Interior*, 673 F.2d 1165 (10th Cir.), *cert. den.*, 459 U.S. 969 (1982), *reh'g den.*, 459 U.S. 1229 (1983).

The decisive factors should be (1) whether the United States and the Tribe had a full and fair opportunity to litigate the preclusion issue before Special Master McGarr,[28] which they did, and (2) whether the State Parties' failure to raise it in *Arizona II* somehow prejudiced the Tribe, which it didn't.

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[28]"The purpose of [FRCP 8(c)] is to give the opposing party notice of the plea of [*res judicata*] and a chance to argue, if he can, why [its] imposition would be inappropriate." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971).

Neither the United States nor the Tribe, to the best of the State Parties' knowledge, have subsequently relied to their detriment in any way on the State Parties' failure to raise the preclusion defense in *Arizona II*. Moreover, this Court's decision in *Arizona II* rejecting the "omitted lands" claims on finality principles should have put them on notice as to the possible application of those principles to the similarly belated "boundary lands" claim. Finally, again to the best of the State Parties' knowledge, neither the Tribe or the United States have made any expenditures for irrigation facilities on the disputed boundary lands in anticipation of a successful outcome in any ultimate judicial proceedings that might resolve the dispute.

D. The Special Master Erred in Treating the 1978 Solicitor's Opinion as an Unforeseeable "Unknown Circumstance" Negating a Preclusion Defense

The Special Master's rejection of the State Parties' argument was premised on the exception to the application of the *res judicata* bar for claims premised on "new facts" that were either not in existence or reasonably ascertainable at the time of the earlier decision.[29] But his treatment of the 1978 Krulitz Opinion as the same as the post-1964 legislation and judicial decisions which led the Court in 1983 to award additional water rights for lands added to the Fort Mojave and Cocopah reservations pursuant to the 1979 Decree is misplaced. Those boundary changes were clearly based on legislative and judicial resolution of *post-1964* disputes outside the control of the Secretary which the Justice Department could have had no reasonable basis to anticipate at the time of trial in *Arizona I*. Consequently, those additions could reasonably be classified as

[29]*See, generally, Moore's Federal Practice* (3rd Ed. 1998) at ¶ 131.21[1].

"acreage not known to be encompassed in 1964," which is the way the United States described the boundary changes to which amended Article II(D) related (page 14 *supra*).

In sharp contrast, the FYIR boundary dispute originally surfaced in 1935, was resolved in 1936, and was well known to the United States in *Arizona I*, but the Secretary made no attempt to reverse his predecessor's decision and claim that the disputed lands were part of the FYIR, as he did with respect to the Fort Mojave and Colorado River Reservation boundaries. None of the facts relating to the proper boundary changed after *Arizona I*. The only post-1964 "changed circumstance" regarding the FYIR dispute was the Solicitor's reversal of the opinions of three of his predecessors as to the legal interpretation of the 1893 Agreement and 1894 Act and the substitution of a previously rejected legal theory. But it is hornbook law that a "different legal theory with [the] same factual basis will usually be barred."[30] It would make *res judicata* and similar "finality principles" meaningless if a subsequent change of mind by a party seeking to avoid an otherwise applicable preclusion bar could qualify as an "unknown circumstance." The Court should reject that concept.

IV. CONCLUSION

The Special Master was presented with two independent grounds for precluding assertion by the United States and the Tribe of a claim for reserved water rights for the FYIR disputed

[30]Id. at ¶ 131.21[3][a]; *accord*: Wright, Miller & Cooper, *Federal Practice and Procedure* (1981) at §4407 (p. 63) ("a mere change in legal theory does not create a new cause of action"); *Armstrong v. Norwest Bank*, 964 F.2d 797, 802 (8th Cir. 1992) (a new theory or body of law does not establish a new claim if both actions are based on the same nucleus of operative facts).

boundary lands: (1) the "finality principles" applied by the Court in *Arizona II* and (2) the extinguishment of any tribal interest in the disputed boundary lands by the $15 million 1983 Claims Court judgment.

The arguments set forth above demonstrate that the "finality principles" applied in *Arizona II* are equally applicable to the FYIR claim, contrary to the Special Master's conclusion, and the claim should be rejected. The State Parties will present their arguments in support of the Special Master's decision regarding the preclusive effect of the Claims Court judgment in their brief opposing the anticipated exceptions to that decision by the United States and the Tribe.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

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EXCEPTION OF THE UNITED STATES

The United States excepts to the Special Master's recommendation that a 1983 judgment of the United States Claims Court, approving the settlement of an action brought against the United States by the Quechan Indian Tribe of the Fort Yuma Reservation, precludes the United States and the Tribe from claiming a reserved water right, in this original action, for 25,000 acres of land that the United States and the Quechan Tribe assert are part of the Tribe's Reservation.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1999

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BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

STATEMENT

The proceedings that are the subject of the Special Master's Report are a sequel to this Court's decisions in *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*), and *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona II*), which address the rights of the Colorado River Basin States and other entities to the use of the waters of the Colorado River. On October 10, 1989, this Court granted the motion of Arizona and California to reopen this original action to resolve questions of water rights arising out of disputed boundary claims with respect to the Fort Yuma, Fort Mojave, and Colorado River Indian Reservations. See *Arizona* v. *California*, 493 U.S. 886 (1989). The United States, the Metropolitan Water District of Southern California, and the

Coachella Valley Water District, as well as Arizona and California and the three Indian Tribes that occupy those reservations, are parties in this litigation.

The Special Master, Frank J. McGarr, has conducted proceedings and prepared a recommendation resolving the disputed boundary issues. The Master has recommended that the Court reject the claims of the United States and the Quechan Tribe for the Fort Yuma Reservation on the ground that they are precluded by prior litigation between the Tribe and the United States. McGarr Report 6-8, 12. He has also recommended that the Court approve the parties' proposed settlement of the claims respecting the Fort Mojave and Colorado River Indian Reservations. *Id.* at 8-12, 12-14. We briefly describe the history of the litigation and the Master's recommendations in the case. We then turn to the United States' exception to the Master's report, which is limited to his recommendation that the Claims Court's 1983 judgment, approving a settlement of an action brought by the Quechan Tribe against the United States under the Indian Claims Commission Act, precludes the United States and the Quechan Tribe from seeking a determination of water rights for lands that the United States and the Tribe both submit are part of the Tribe's Reservation.

A. The History Of The *Arizona* v. *California* Litigation

In 1952, the State of Arizona initiated this original action against the State of California and its public agencies to confirm Arizona's entitlement to the use of water in the Colorado River Basin and to limit California's consumption of that water. See *Arizona I*, 373 U.S. 546 (1963); see also *Arizona II*, 460 U.S. 605, 608-613 (1983) (describing the history of the litigation). The States of Nevada, Utah, and New Mexico became

parties to the suit, by intervention or joinder, and the United States intervened on behalf of various federal establishments that are entitled, under federal law, to use the Colorado River's waters. See *Arizona II*, 460 U.S. at 608-609. Those establishments include five Indian reservations: (1) the Colorado River Indian Reservation; (2) the Fort Mojave Indian Reservation; (3) the Fort Yuma (Quechan) Indian Reservation; (4) the Chemehuevi Indian Reservation; and (5) the Cocopah Indian Reservation. *Id.* at 609.

The Court appointed a Special Master, Simon Rifkind, who conducted extensive proceedings and recommended a division of the Colorado River's waters. The Court issued a detailed decision that largely adopted the Master's recommendations, see *Arizona I*, 373 U.S. 546 (1963), and the Court later embodied its judgment in a judicial decree, 376 U.S. 340 (1964) (the 1964 Decree). The Court recognized that the Colorado River Compact, set out at 70 Cong. Rec. 324 (1928), provided for a division of water between the Upper Basin States (Colorado, Wyoming, Utah and New Mexico) and the Lower Basin States (Arizona, Nevada, and California). See 373 U.S. at 557-558. But the Compact did not provide for a further subdivision of water among the three Lower Basin States. *Ibid.*

The Court ultimately concluded that the Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928), which authorized the construction of the All-American Canal and other Colorado River diversion works, accomplished that subdivision. Under that Act, the first 7,500,000 acre-feet of mainstream waters each year are allocated in the amount of 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada. California and Arizona are each entitled to one-half of any surplus in excess of 7,500,000 acre-feet,

and each State is entitled to full use of the tributaries within its borders. See *Arizona I*, 373 U.S. at 564-565; see also *Arizona II*, 460 U.S. at 609-610.

The Court also determined that the United States had reserved water rights for the five Indian reservations in accordance with the Court's decision in *Winters* v. *United States*, 207 U.S. 564 (1908). See *Arizona I*, 373 U.S. at 598-600; see also *Arizona II*, 460 U.S. at 609. Under *Winters*, the United States' creation of an Indian reservation to provide an agriculture-based homeland includes a reservation of sufficient water to irrigate those reservation lands that are capable of growing crops. See *Arizona I*, 373 U.S. at 601; see also *Arizona II*, 460 U.S. at 609-610. The Court adopted the Master's findings respecting the amounts of practicably irrigable lands on the various reservations, the corresponding amounts of water that the Tribes were entitled to withdraw from the mainstream of the Colorado River, and the priority dates of those "present perfected rights." *Ibid.* The 1964 Decree specifically recognized the Tribes' federally reserved water rights. See Decree Art. II(D), 376 U.S. at 344-345.

Nevertheless, the Court did not finally resolve all aspects of the water rights for the Indian reservations. The Court disagreed with the Master's decision to determine the disputed boundaries of the Fort Mojave Indian Reservation and the Colorado River Indian Reservation. The Court stated:

> We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

Arizona I, 373 U.S. at 601; see also *Arizona II*, 460 U.S. at 610-611 & n.3. Article II(D) of the 1964 Decree accordingly provided that the entitlement of the United States to water for those two reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 345.

Between 1969 and 1978, the Secretary of the Interior issued orders determining the boundaries of the Fort Yuma, Fort Mojave, and Colorado River Indian Reservations. See *Arizona II*, 460 U.S. at 631-634. Meanwhile, the parties in the original action moved this Court to revise the 1964 Decree to set out their rights with greater specificity. The five Indian Tribes for whose reservations the United States had claimed reserved water rights in the previous proceedings moved to intervene and make claims for additional water, and the United States later joined the Tribes in seeking additional water. *Id.* at 612. Without resolving those additional issues, the Court entered a Supplemental Decree setting out the "present perfected rights to the use of mainstream water in each State and their priority dates" under the 1964 Decree. *Arizona* v. *California*, 439 U.S. 419, 420 (1979). The Supplemental Decree described the water rights for all five Indian reservations under the 1964 Decree, *id.* at 423, 428, but also noted that the rights for all five reservations "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.* at 421. The Court denied the Tribes' motions to intervene insofar as they sought to oppose entry of the Supplemental Decree. *Id.* at 437. At the United States' suggestion, the Court otherwise re-

ferred the Tribes' motions to intervene, as well as the further matters raised by the United States and the Tribes, to a Special Master, Senior Judge Elbert P. Tuttle. See *id.* at 436-437; *Arizona II*, 460 U.S. at 611-612.

Master Tuttle issued a preliminary and a final report. See *Arizona II*, 460 U.S. at 612-613. He granted the Tribes leave to intervene, and he determined that the Secretary of the Interior's administrative actions had determined, with finality, the boundaries of the Tribes' reservations for purposes of Article II(D) of the 1964 Decree. 460 U.S. at 613; see also *id.* at 631-634 (describing Secretary's actions). Those "boundary lands" determinations resulted in an enlargement of the reservations, entitling the Tribes to additional water. *Id.* at 613. Master Tuttle also determined that there were additional lands – the so-called "omitted lands"—within the recognized 1964 boundaries that were entitled to water under the practicably irrigable acreage standard. He therefore recommended that the Court reopen the 1964 Decree to award the Tribes additional water rights. The States filed exceptions to those determinations. *Ibid.*

This Court overruled the exceptions in part and sustained them in part. *Arizona II*, 460 U.S. at 613-642. The Court first rejected the States' objection to the Tribes' intervention, concluding that the Tribes were entitled to represent their interests in this case. *Id.* at 613-615. It next examined the States' exception to the Master's recommendation that the 1964 Decree should be reopened to award the Tribes additional water on account of the "omitted lands" that were within the 1964 reservation boundaries, but had not received water rights under the practicably irrigable acreage standard. *Id.* at 615-628. The Court sustained that

exception, ruling that "principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage." *Id.* at 626.

The Court also addressed the States' exception to the Master's conclusion that the Secretary of the Interior's determination of the Tribes' reservation boundaries was a "final determination" of those boundaries, entitling the United States (and the Tribes) to additional water commensurate with the actual size of the reservations. *Arizona II*, 460 U.S. at 628-641. The Court ruled that the Secretary's determinations were not, in themselves, final determinations of the boundary disputes, because the States had not had an opportunity to obtain judicial review of the Secretary's decisions. *Id.* at 636-638. The Court noted that California's agencies had initiated a judicial action in federal district court challenging the Secretary's determinations, *Metropolitian Water Dist. of S. Cal.* v. *United States*, Civ. No. 81-0678-GT(M) (S.D. Cal.), and it suggested that that litigation "should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated." *Arizona II*, 460 U.S. at 638-639.

In remitting the boundary lands dispute to the district court, the Court expressly declined to intimate an opinion "as to the Secretary's power or authority to take the actions that he did or as to the soundness of his determinations on the merits." *Arizona II*, 460 U.S. at 637. Furthermore, the Court noted that the United States had moved to dismiss the district court action on various grounds, including sovereign immunity. *Id.* at 638. The Court stated that "[t]here will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by

such action are nevertheless open for litigation in this Court." *Ibid.*[1]

The district court litigation went forward with seven of the parties from the prior proceedings: the United States, the States of Arizona and California, the Metropolitan Water District of Southern California, the Coachella Valley Water District, and the Quechan, Fort Mojave, and Colorado River Indian Tribes. The district court rejected the United States' sovereign immunity defense and, on cross-motions for summary judgment, voided the Secretary's determination of the Fort Mojave Reservation's boundaries. *Metropolitan Water Dist. of S. Cal.* v. *United States*, 628 F. Supp. 1018 (S.D. Cal. 1986). The district court certified its order for interlocutory appeal, pursuant to 28 U.S.C. 1292(b), and the court of appeals remanded the case with directions to dismiss for lack of jurisdiction. *Metropolitan Water Dist. of S. Cal.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd, 490 U.S. 920 (1989). The court of appeals concluded that the Quiet Title Act, 28 U.S.C. 2409a, which preserves the United States' sovereign immunity from suits challenging the United States' title "to trust or restricted Indian lands," 28 U.S.C. 2409a(a), barred the plaintiffs' suit. 830 F.2d at 143-144. This Court granted a petition for a writ of certiorari to review the court of appeals' judgment and affirmed that judgment

[1] The Court noted that several of the Tribes had obtained an adjudication of some of the boundary lands in dispute through litigation quieting title to individual tracts. See *Arizona II*, 460 U.S. at 633, 636 n.26. The Court also recognized that Congress had directed the Secretary to add federally owned land to the Cocopah Reservation. See *id.* at 633, 636 n.26. The Court concluded that those matters had been finally determined and accepted the Master's determination of the practicably irrigable acreage within those areas. *Id.* at 636, 640-641.

by an equally divided Court. *California* v. *United States*, 490 U.S. 920 (1989).

B. The Current Litigation

Following this Court's decision in *California* v. *United States*, *supra*, the States and their agencies moved this Court to reopen the 1964 Decree in *Arizona* v. *California*. They specifically asked the Court to determine whether the Quechan, Fort Mojave, and Colorado River Indian Reservations are entitled to additional boundary lands and whether the Tribes are entitled to additional water rights that would be associated with such additions. See McGarr Report 4-5. Neither the United States nor the Tribes objected to that course of action, and the Court granted the motion. 493 U.S. 886 (1989).

The Court appointed Professor Robert B. McKay as Special Master to conduct the reopened proceedings. 493 U.S. 971 (1989). Professor McKay died in 1990, and the Court appointed Special Master McGarr to succeed him. 498 U.S. 964 (1990). The Master has issued a series of orders that have culminated in his Report setting out his recommended resolution of these proceedings. The Master has recommended that the Court reject the claims of the United States and the Quechan Tribe respecting the Fort Yuma Reservation. See McGarr Report 6-8, 12. He has also recommended that the Court approve the parties' proposed settlements respecting the Fort Mojave and Colorado River Indian Reservations, finding that those settlements "equitably resolve the water rights disputes in the matter referred to me." *Id.* at 14. See also *id.* at 8-12, 12- 13.

The Master concluded that principles of res judicata preclude the Quechan Tribe from seeking additional water for the boundary lands of the Fort Yuma Res-

ervation. The claim concerning the Fort Yuma Reservation arises out of a dispute over the validity of an 1893 agreement between the United States and the Tribe, which essentially provided that the Tribe would cede a portion of its Reservation lands (including the so-called boundary lands) on the condition that the United States would provide irrigation for other lands within the Reservation. See *Arizona II*, 460 U.S. at 632-633; App., *infra*, 1a-10a (text of 1893 Agreement). The Master rejected the States' contentions that this Court's *Arizona I* and *Arizona II* decisions prevented the Tribe from seeking additional water for the boundary lands. See McGarr Report App. 2(A), at 7. The Master nevertheless concluded that the Tribe could not pursue those claims because of a 1983 judgment of the United States Claims Court, which approved a settlement between the United States and the Tribe respecting those lands. *Id.* at 9-10. See *Quechan Tribe of the Fort Yuma Reservation* v. *United States*, No. 320 (Cl. Ct. Aug. 11, 1983) (final judgment) (*reprinted* at App., *infra*, 66a-67a). The Master appears to have concluded, contrary to the submissions of the United States and the Tribe, that their settlement divested the Tribe of any claim to the boundary lands and the corresponding water rights. McGarr Report 7-8 & App. 2(A), at 9-10. The Master denied a series of motions for reconsideration. See *id.* App. 2(B)-(D).

The Master also determined that the Court should approve the parties' proposed settlement of the dispute respecting the boundaries of the Fort Mojave Reservation. The claim to additional water for that Reservation arises out of a dispute over the accuracy of a survey of the so-called Hay and Wood Reserve portion of the Fort Mojave Indian Reservation. See *Arizona II*, 460 U.S. at 631-632. The parties agreed to settle

that matter through a proposed agreement, the principal provisions of which: (1) specify the boundary of the Reservation in the vicinity of the Hay and Wood Reserve; (2) preserve the claims of the parties respecting title to and jurisdiction over the bed of the last natural course of the Colorado River within the specified boundary; (3) entitle the Tribe to divert the lesser of an additional 3022 acre-feet of water or enough water to supply the needs of 468 acres; (4) preclude the United States and the Tribe from claiming additional water rights from the Colorado River water for lands within the Hay and Wood Reserve; and (5) disclaim any intent to affect any private claims to land or to determine title to or jurisdiction over such land. See McGarr Report 8-9 & App. 3.

The Master likewise determined that the Court should approve the parties' proposed settlement of the dispute respecting the Colorado River Indian Reservation. The claim to additional water for that Reservation arises primarily out of a question whether the Reservation boundary is the ambulatory west bank of the Colorado River or a fixed line representing a past location of the River. See *Arizona II*, 460 U.S. at 631-632. The Master issued an initial order resolving the boundary issue against the Tribe, and the parties thereafter negotiated a proposed settlement of the issue. Under the terms of that settlement, the parties would agree to leave the Reservation boundary unadjudicated in this litigation and would instead recognize that the Tribe is entitled to a fixed amount of water in resolution of the Tribe's underlying water rights claim. That settlement, among its principal terms: (1) awards the Tribes the lesser of an additional 2100 acre-feet of water or enough water to irrigate 315 acres; (2) precludes the Tribe or the United States from seeking additional reserved

water rights from the Colorado River for lands in California; (3) expresses the understanding that the parties will not adjudicate in these proceedings the correct location of the disputed boundary; (4) preserves the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the Reservation; (5) provides that the agreement will become effective only if the Master and the Court approve the settlement. See McGarr Report 9-10 & Apps. 4-5. The Master expressed some concern that the settlement does not resolve title to the disputed boundary lands, but he recognized that the settlement does achieve the end aim of this litigation: a final determination of the Tribes' water rights respecting the disputed boundary lands. *Id.* at 10-12, 13- 14.

The Master has submitted a proposed draft of a Supplemental Decree that would carry his decision into effect. McGarr Report App. 6.

SUMMARY OF ARGUMENT

The United States supports the Master's recommendations that the Court approve the settlements respecting the Fort Mojave Indian Reservation and the Colorado River Indian Reservation. The settlements will produce an equitable resolution of two longstanding water rights disputes and will provide all of the interested parties in the Colorado River Basin with greater certainty and stability respecting their entitlement to the use of the Colorado River. The United States excepts, however, to the Master's determination of the water rights claim respecting the Fort Yuma Indian Reservation.

The Master concluded that the Quechan Tribe was precluded from claiming water rights on account of a 1983 settlement, entered as a consent judgment in the

United States Claims Court, between the United States and the Quechan Tribe regarding the boundary lands at issue in this litigation. The Master misapprehended the scope and significance of the Claims Court judgment. The historical record shows that the Tribe brought suit against the United States under the Indian Claims Commission Act challenging an 1893 agreement in which the Tribe purported to cede those lands to the United States. The Tribe argued, among other things, that the 1893 agreement was invalid and failed to divest the Tribe of its lands. The Secretary of the Interior ultimately concluded that the Tribe was correct and entered an administrative decision recognizing the Tribe's entitlement to the boundary lands. The United States and the Quechan Tribe thereafter settled the Tribe's claim for compensation under the Indian Claims Commission Act, and that settlement was entered as a judgment of the Claims Court. Under the terms of the settlement, the United States paid the Tribe $15 million in settlement of the Tribe's claims for compensation for the temporary deprivation of the boundary lands prior to 1978 and the permanent loss of other lands. The parties stipulated that the judgment resolved all of the Tribe's claims against the United States respecting its lands.

The Master concluded that, because the Claims Court settlement resolved all of the Tribe's claims, it must have divested the Tribe of the boundary lands and deprived the Tribe of any claim of water rights to those lands. The Master is clearly mistaken. The United States agreed to settle the Tribe's suit because it recognized that the Tribe owned the boundary lands. The corresponding consent judgment precludes the Tribe from bringing any further claims against the United States respecting the boundary lands, but it

does not preclude either the United States or the Tribe from asserting reserved water rights for those lands in these proceedings. The Claims Court judgment did not decide any question concerning reserved water rights for the boundary lands, and that matter remains to be determined on the merits in these proceedings.

The Master's recommendation regarding the Fort Yuma Reservation has improperly denied the United States and the Tribe their opportunity to adjudicate the merits of the existence of reserved water rights for the boundary lands of that Reservation, has cast a cloud over the Tribe's equitable title to the disputed lands, and has perpetuated an injustice that should be corrected. This Court should sustain the United States' exception and remand the case for further proceedings to determine and quantify the reserved water rights.

ARGUMENT

THE UNITED STATES CLAIMS COURT'S 1983 JUDGMENT DOES NOT PRECLUDE THE UNITED STATES OR THE QUECHAN TRIBE FROM OBTAINING A DETERMINATION OF RESERVED WATER RIGHTS IN THESE PROCEEDINGS

The Master has recommended that the United States and the Quechan Tribe should be precluded from asserting water rights in this litigation because the Tribe entered into a compromise judgment with the United States in the United States Claims Court respecting its ownership of the lands for which it claims those rights. The Master's recommendation is mistaken. The United States and the Quechan Tribe reached a compromise based on their joint understanding, reflected in an order of the Secretary of the Interior, that the lands in question are part of the Tribe's Reservation. The resulting judgment accordingly provides no basis for barring the United States or the Tribe from seeking a judicial determination of reserved water rights for those lands. The Master's error is apparent from the historical record and the documents that set out the basis for the Claims Court's judgment. We therefore begin by tracing the history of the Quechan Tribe's boundary lands claim. We then explain the specific flaws in the Master's reasoning and suggest the appropriate course for proceedings on remand.

A. THE CLAIMS COURT'S JUDGMENT RESTS ON THE JOINT UNDERSTANDING OF THE UNITED STATES AND THE QUECHAN TRIBE THAT THE TRIBE OWNS THE LANDS IN QUESTION

The Claims Court's judgment arose from the Quechan Tribe's longstanding challenge to an 1893 agreement between the United States and the Tribe in which the Tribe ceded a portion of its Reservation to the United States. The Tribe challenged the validity of that agreement through requests for review by the Department of the Interior and through judicial proceedings under the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.* (1976). The Tribe's efforts culminated in a determination by the Secretary of the Interior that the conditions specified in the 1893 agreement for the cession by the Tribe to be effective had not been satisfied by the United States (the Secretarial Order) and a judicial settlement of the Tribe's suit under the Indian Claims Commission Act, which was entered as a final judgment in the Claims Court (the Claims Court judgment). The history of the Tribe's claims and their resolution demonstrates—contrary to the Master's understanding—that the United States and the Tribe reached their compromise on the understanding that the Quechan Tribe

owns the lands in question and that the United States and the Tribe would be entitled to seek water rights for those lands in these proceedings.

1. The 1893 Agreement

On January 9, 1884, President Chester A. Arthur issued an Executive Order (the 1884 Executive Order) creating the Fort Yuma Reservation for the benefit of the Quechan Tribe, whose members were then described as the "Yuma Indians." 1 Charles J. Kappler, *Indian Affairs Laws and Treaties* 832 (1904). The 1884 Executive Order described a tract of land, approximately 72 square miles in size, located along the Colorado River in California. 1 Kappler, *Indian Affairs* at 832. In 1893, the Tribe, which had historically engaged in farming, petitioned the President and Congress to have its lands irrigated, and it offered to cede its rights to a portion of the Fort Yuma Reservation to the United States in exchange for allotments of irrigated land to individual Indians. See S. Exec. Doc. No. 68, 53d Cong., 2d Sess. 14-16 (1894). By the Act of March 3, 1893, Congress authorized the Secretary of the Interior to negotiate with any Indian Tribe for surrender of a portion of its reservation, provided that the agreement would be subject to ratification by Congress. Ch. 209, 27 Stat. 633. In the case of the Quechan Tribe, the Secretary appointed a three-member commission, which met with the male tribal members and, on December 4, 1893, concluded an agreement (the 1893 Agreement). Congress ratified that agreement the following year. See Act of Aug. 15, 1894, ch. 290, § 17, 28 Stat. 332 (the 1894 Act); see App., *infra*, 1a-10a.

Article I of the 1893 Agreement provides in relevant part that the Quechan Tribe, "upon the conditions hereinafter expressed, do hereby surrender and relinquish

to the United States all their right, title, claim, and interest in and to and over the following described tract," 28 Stat. 332-334, which consists of approximately 25,000 acres. Articles II and III provide for the allotment of lands to tribal members (28 Stat. 333), and Articles III and IV address the sale of other lands to raise revenue for tribal irrigation and agriculture (28 Stat. 334). Article V states that the allotments shall be held in trust (28 Stat. 334), while Article VI states that lands that cannot be irrigated shall be open to settlement under the general land laws (28 Stat. 334). Article VII preserves an Indian school on the Reservation (28 Stat. 334-335). Article VIII states that the Agreement shall be in force after its approval by Congress, which Congress provided in the 1894 Act, together with statutory provisions granting private rights-of-way through the Reservation for a railroad and an irrigation company. 28 Stat. 335-336.

2. The Department Of The Interior's Initial Rejection Of The Quechan Tribe's Land Claims

The 1893 Agreement has been a source of legal conflict since as early as 1935. The construction of the All-American Canal, which precipitated the interstate conflict in *Arizona I*, see 373 U.S. at 554-555, prompted a separate controversy on the Fort Yuma Reservation. The Department of the Interior's Bureau of Reclamation sought to route the canal, which was designed to provide Colorado River water to non-Indian farmers in California, through the Reservation. The Department of the Interior's Indian Office asserted that the Bureau of Reclamation was required to pay the Quechan Tribe compensation for the right-of-way. The Bureau disputed that the Tribe was entitled to compensation, arguing that the canal passed through lands that the

Tribe had relinquished to the United States through the 1893 Agreement. The Secretary of the Interior submitted the question to the Solicitor of the Interior, Nathan Margold, who agreed with the Bureau that the 1893 Agreement had unconditionally ceded the lands in question. See 1 Dep't of the Interior, Opinions of the Solicitor Relating to Indian Affairs 596 (No. M-28198 Jan. 8, 1936).

3. The Quechan Tribe's Commencement Of Suit Under The Indian Claims Commission Act

In 1946, Congress enacted the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.* (1976), which created an Article I tribunal with power to decide claims of Indian Tribes against the United States.[2] The Quechan Tribe filed an action before the

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[2] The Indian Claims Commission Act authorized any Indian Tribe, band, or other identifiable group of Indians to commence an action against the United States, for

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

§ 2, 60 Stat. 1050. See generally *United States* v. *Dann*, 470 U.S. 39 (1985). The Commission resolved more than 500 cases between 1946 and 1978. Pursuant to Act of Congress (Pub. L. No. 94-465, 90 Stat. 1990), the Commission ceased its operations on September 30, 1978, and transferred its remaining cases to the Court of Claims. See United States Ind. Cl. Comm'n, *Final Report*, H.R. Doc. No. 383, 96th Cong., 2d Sess. (1980).

[3] It appears that, during the long course of the litigation, the Tribe sometimes emphasized its theory that the 1893 Agreement was invalid and that the Tribe retained title to the land, while at other times it emphasized its alternative theory that the 1893 Agreement resulted in an uncompensated taking of tribal lands or

Commission challenging the 1893 Agreement. See Petition for Loss of Reservation, *Quechan Tribe of the Fort Yuma Reservation* v. *United States*, No. 320 (filed Aug. 10, 1951) (App., *infra*, 11a-23a). The Tribe's petition was styled as a "Petition for Loss of Reservation," but it sought relief on a variety of theories. It alleged for example, that the 1893 Agreement had resulted in an "expropriation" of part of the Tribe's original reservation, *id.* at 13a-14a, and that the Agreement had been obtained through fraud, coercion, and unconscionable consideration, rendering it "wholly nugatory," *id.* at 17a-18a. The Tribe sought both monetary compensation, *id.* at 19a, 21a, 22a, and "such other and further relief as to [the] Commission may appear just and equitable," *id.* at 23a. In June 1958, the Tribe amended its petition to add additional allegations, including that the United States had defaulted on its obligations under the 1893 Agreement and that, if the Commission determined that the 1893 Agreement is valid and binding, the Tribe should be awarded damages for the United States' breach. *Id.* at 26a-27a.[3]

The Commission conducted a trial on liability, but stayed further proceedings in 1970 because legislation had been proposed in Congress to return the disputed lands to the Tribe. The legislation was not enacted, and the Commission vacated the stay. See *Quechan Tribe of the Fort Yuma Reservation* v. *United States*, 26 Ind. Cl. Comm'n 15 (1971) (App., *infra*, 29a-34a). Upon the lifting of the stay, the Tribe requested permission to supplement the record with additional evidence showing the invalidity of the 1893 Agreement, so that the Tribe could establish that it retained title to the land. *Id.* at 30a-31a. The Commission granted the Tribe the opportunity to introduce such evidence, but the Commission also stated that it lacked the power to declare the Agreement invalid. *Id.* at 31a-34a. The Commission observed that the evidence nevertheless could be relevant to the question of damages on other available theories of recovery. *Id.* at 32a. On December 15, 1976, the Indian Claims Commission transferred the matter to the Court of Claims. See H.R. Doc. No. 383, 96th Cong., 2d Sess. 121 (1980); see note 2, *supra*.

4. The Department Of The Interior's Reconsideration Of The Quechan Tribe's Land Claims

Faced with the Indian Claim's Commission's statement that it had no authority to invalidate the 1893 Agreement, the Tribe requested the Department of the Interior to reconsider its position that the 1893 Agreement was valid.[4] The ensuing events are set out in a 1977 Opinion that Interior Solicitor Scott Austin prepared in response to congressional oversight hearings into the Quechan land dispute. See Opinion of the Solicitor, Dep't of the Interior, No. M-36886 (Jan. 18, 1977), 84 Interior Dec. 1 (1977) (the Austin Opinion); *Quechan Tribe of Fort Yuma Reservation, California: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. (1976) (*1976 Hearings*).

The Austin Opinion recites that the Tribe's counsel met with Solicitor Frizzell in 1973 and that the Solicitor agreed to initiate an examination into the legal question and the underlying facts. 84 Interior Dec. at 33. Attorneys within the Solicitor's office examined the matter and prepared a number of drafts of an opinion. *Ibid.* In 1976, Secretary Kleppe and other officials met with representatives of the Quechan Tribe and non-Indian interests. Secretary Kleppe referred the matter to Solicitor Austin, who concluded, in accordance with the 1936 Margold Opinion, that the 1893 Agreement was valid, and he so notified the Tribe. *Id.* at 33- 34. Solicitor Austin's action prompted the congressional oversight hearings cited above. See *1976 Hearings*, *supra*. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion explaining his decision. See note 6, *infra*. Solicitor Austin published his opinion on January 17, 1977, in response to the congressional and other inquiries. 84 Interior Dec.

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required the payment of damages based on an alleged violation of a duty of fair and honorable dealings (see note 2, *supra*). See *Quechan Tribe of the Fort Yuma Reservation* v. *United States*, 26 Ind. Cl. Comm'n 15 (1971) (App., *infra*, 29a-34a); Dep't of the Interior, Opinion of the Solicitor, No. M-36886 (Jan. 18, 1977), 84 Interior Dec. 1, 31-32 (1977) (Austin Opinion) (discussed at pages 22-24, *infra*).

[4] In 1968, Solicitor Edward Weinberg had reaffirmed the Department's view that the 1893 Agreement was valid in an unpublished memorandum issued in connection with a Bureau of Land Management lease. See Austin Opinion, 84 Interior Dec. at 33.

at 2. The Austin Opinion sets out in detail the history of the Quechan land dispute. See *id.* at 2-34. It concludes that the 1893 Agreement is valid and enforceable, relying primarily on a determination that the Tribe's cession of the disputed boundary lands was unconditional and did not depend on the government's fulfillment of its undertakings in the Agreement. *Id.* at 35-41.[5]

Less than two years later, while the Quechan Tribe's actions under the Indian Claims Commission Act remained pending (albeit transferred from the Commission to the Court of Claims, see note 2, *supra*), Solicitor Leo Krulitz reconsidered the matter in response to the requests of the Quechan Tribe, the Bureau of Indian Affairs, and Chairman Henry Jackson of the Senate Committee on Interior and Insular Affairs. See Dep't of the Interior, Opinion of the Solicitor, No. M-36908 (Dec. 20, 1978), 86 Interior Dec. 3, 4-5 (1979) (Krulitz Opinion). Solicitor Krulitz noted at the outset that the Quechan land dispute had provoked considerable debate within the Interior Department and that the Austin opinion had been issued under unusual circum-

[5] Solicitor Austin also concluded that: (1) Congress's enactment of legislation in 1904 providing for the irrigation of tribal lands did not implicitly repeal the 1893 Agreement (84 Interior Dec. at 41-44); (2) assuming arguendo that the cession was conditional, the government had satisfied the conditions (*id.* at 44-47); (3) the government had not treated the disputed lands as if they continued to belong to the Tribe (*id.* at 47-49); (4) the special rules governing construction of agreements with Indian Tribes did not compel a different result (*id.* at 49-50); (5) the Tribe had failed to document its allegations of fraud, coercion, and inequity (*id.* at 50-53); and (6) prior judicial and administrative precedents supported his interpretation (*id.* at 53).

stances. *Id.* at 4.[6] The "sharp and continuing divergence in legal views with respect to this issue" prompted the Solicitor to direct a "review of the Department's files and all previously prepared legal opinions to provide an independent evaluation of the Quechan claim to the 25,000 nonirrigable acres." *Id.* at 4.

Based on that review, Solicitor Krulitz concluded that "the 1893 agreement and 1894 ratifying statute provided for a *conditional* cession of the nonirrigable acreage." 86 Interior Dec. at 4. He summarized his basic conclusion as follows:

> The conditions articulated in the agreement, which included the allotment and irrigation of irrigable land to the Indians, the sale of surplus to settlers under strictly prescribed conditions, the construction of an irrigation canal, and the opening of nonirrigable lands to settlement, were not met by the United States. No lump sum, or other form of compensation, was provided for the land cession.

[6] "Prior to the issuance of the [Austin Opinion], a draft Solicitor's Opinion to the opposite effect was widely circulated. That Opinion concluded that the 1893 agreement and the 1894 ratifying statute provided for a conditional cession of the nonirrigable lands, that the conditions were not fulfilled, and that the cession of the nonirrigable lands had therefore not been effected. Department files on this subject reveal that the draft opinion was seriously considered, and that extensive preparations were made for the issuance of a decision in favor of the tribe. The February 1976 decision by the Solicitor upholding the 1936 opinion was an unexpected event. The Senate Subcommittee on Indian Affairs held hearings in May and June of 1976, to air the controversy and learn the legal basis of the 1976 decision by the Solicitor. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion supporting the 1976 decision. A written opinion, [the Austin Opinion], was published on Jan. 17, 1977." 86 Interior Dec. at 4.

> Allotment and irrigation did not occur on the reservation until Congress passed a 1904 statute (33 Stat. 189), which applied the Reclamation Act to the Ft. Yuma and Colorado River Reservation. The 1904 Act appears to be totally unrelated to the 1893 cession agreement, except for mention of it in the legislative history as part of the explanation of the continuing lack of irrigation on the reservation. In short, the conditional cession in 1893 was never effected and the title to the nonirrigable acreage, therefore, remains in the Tribe.

Id. at 4-5. See *id.* at 6-22 (setting out the Solicitor's legal analysis). The Solicitor accordingly overruled the Austin Opinion and concluded that "[t]itle to the subject property is held by the United States in trust for the Quechan Tribe." *Id.* at 22. On December 20, 1978, Secretary of the Interior Cecil Andrus entered the Secretarial Order based on the Krulitz Opinion, see App., *infra*, 41a; *Arizona II*, 460 U.S. at 632-633, and Secretary of the Interior James Watt later reissued that Order to describe, with greater particularity, the Fort Yuma Reservation's boundaries, see 46 Fed. Reg. 11,372 (1981).[7]

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[7] The Secretarial Order recognized that the Quechan Tribe was not entitled to lands and property interests that the United States had acquired pursuant to Act of Congress or had conveyed to third parties prior to December 20, 1978, and the Order expressly identified those property rights. See 46 Fed. Reg. at 11,372-11,375. The Secretarial Order also recognized that the "[n]othing contained herein shall prevent the Tribe from recovering whatever compensation it may be determined is appropriate in any proceeding now pending or hereafter brought for past use of such lands," but that the Tribe had relinquished any claims against third parties for trespass. *Id.* at 11,375.

5. The Impact Of The Secretarial Order On Pending Litigation

The Secretarial Order had a direct impact on ongoing litigation, both with respect to this Court's proceedings in *Arizona* v. *California* and with respect to the Quechan Tribe's suit under the Indian Claims Commission Act, which by that time was pending in the Court of Claims (see note 2, *supra*). The Secretarial Order expressly recognized that the Quechan Tribe held title to the affected boundary lands. As a result, the United States was required to modify its litigation positions in those cases to reflect that change in view. The Master's recommendation rests on a fundamental misunderstanding of the United States' corresponding actions in the two cases.

In the case of the *Arizona* v. *California* original action, the Secretarial Order prompted the United States to file a water rights claim for the affected boundary lands, and it provided the basis for the Quechan Tribe's intervention in the original action to assert a similar (albeit larger) water rights claim. See *Arizona II*, 460 U.S. at 632-633; Report of Special Master Tuttle 62 (Feb. 22, 1982); see also 46 Fed. Reg. at 11,375 (provision in Order reissued by Secretary Watt, restating provision in 1978 Secretarial Order, specifically contemplating the filing of a claim for water rights for the boundary lands in *Arizona* v. *California*). Those water rights claims are, of course, the precise claims that the Court has referred to Special Master McGarr for adjudication in these proceedings. See McGarr Report 5.

In the case of the Quechan Tribe's suit under the Indian Claims Commission Act, the Secretarial Order fundamentally altered the posture of the case. As we have explained, the Tribe's claims under the Indian

Claim Commission Act rested on alternative theories. On the one hand, the Tribe argued that the 1893 Agreement was invalid. If that was true, and the Agreement was therefore ineffective in accomplishing a cession of Tribal lands, the Tribe would own the disputed land and the United States would be potentially liable for trespass or for the Tribe's temporary loss of the use of the lands.[8] On the other hand, the Tribe argued in the alternative that the 1893 Agreement was valid, but resulted in a permanent uncompensated taking of those lands or gave rise to damages under a "fair and honorable dealings" theory. The Secretarial Order amounted to an admission by the United States that the Agreement was ineffective to accomplish a cession of the Tribe's lands and that the Tribe owned the disputed lands. To be sure, the Secretarial Order could be challenged by affected third parties in other litigation. See *Arizona II*, 460 U.S. at 636-639. But unless set aside in third-party litigation, the Secretarial Order would establish crucial elements of the Tribe's former theory and largely moot the Tribe's claim under the second theory.[9]

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[8] As we have explained, the Indian Claims Commission stated in a 1971 opinion that it lacked the authority to invalidate the 1893 Agreement. See pages 21-22, *supra*. The Commission, however, could award damages for trespass or temporary occupation if the United States conceded that the Tribe retained ownership of the affected lands. See *Northern Paiute Nation* v. *United States*, 490 F.2d 954, 956, 959 (Ct. Cl. 1973); *Goshute Tribe* v. *United States*, 31 Ind. Cl. Comm'n 225, 291-306, aff'd, 512 F.2d 1398 (Ct. Cl. 1975).

[9] The Secretarial Order would not completely moot the Tribe's taking claim because the Tribe sought reimbursement for certain lands that the United States had acquired without paying compensation and would permanently retain regardless of the validity of the 1893 Agreement. See note 7, *supra*. Those lands included, for example, the right of way for the All-American Canal, which had prompted the original Margold opinion. See pages 17-18, *supra*.

On May 26, 1983, less than two months after this Court's decision in *Arizona II*, the United States and the Quechan Tribe filed a joint memorandum with the United States Claims Court (which had succeeded to the jurisdiction of the Court of Claims over claims under the Indian Claims Commission Act[10]), in which they expressly acknowledged the consequences of the Secretarial Order. See Joint Memorandum re Stipulations (May 26, 1983) (App., *infra*, 35a-41a). The joint memorandum stated that, "[a]ccording to the order of the Secretary of the Interior, dated December 20, 1978, and by Supplemental Determination and Directives of the Secretary of the Interior, dated January 30, 1981, the 1884 executive order boundary of the Fort Yuma Indian Reservation * * * still remain[s] the reservation boundary." *Id.* at 36a; accord *id.* at 36a-37a. The joint memorandum then stated:

> 8. If the December 20, 1978, secretarial order is upheld, there are no remaining issues as to the liability of the United States for the acquisition of portions of the Quechan Reservation. The issues remaining in the case relate to the determination of the damages sustained by the Quechan.
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> 9. If the December 20, 1978, secretarial order is upheld, the proper measure of damages for the portions of the reservation which were permanently acquired from the Quechan [*e.g.*, the right-of-way for the All-American Canal, see note 9, *supra*] is the fair market value of those portions of the reserva-

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[10] See Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 149, 96 Stat. 46.

> tion on the effective dates of the permanent acquisitions. No stipulation is entered into as to the measure of damages for the temporary deprivation of those lands which were reaffirmed by the executive order of December 20, 1978, or of those lands which, after a period of temporary deprivation, were permanently acquired.

App., *infra*, 37a-38a.

The United States and the Tribe were unable to enter into a stipulation respecting the measure of damages for the temporary deprivation of the land because they disagreed on the way such damages should be calculated. The Tribe offered to stipulate that, as a result of the Secretarial Order of December 20, 1978, there were no remaining liability issues and that damages respecting the Tribe's retained boundary lands should be measured on the basis of their fair rental value. App., *infra*, 39a. The United States, however, declined to enter into those stipulations because of this Court's conclusion in its then-recent decision in *Arizona II* that there must be a judicial determination of the boundary (see 460 U.S. at 636-639), and because the United States contended in any event that the proper measure of damages for a temporary deprivation is the rents actually received by the United States. App., *infra*, 39a-40a. The United States' concern is understandable: If the United States unconditionally stipulated that the Tribe owned the disputed lands, and a third party (*e.g.*, a party in the *Arizona* v. *California* water rights litigation) later obtained a judgment invalidating the Secretarial Order while the Claims Court action remained pending, then the United States could remain bound by the stipulation in the Claims Court proceedings and perhaps be liable for damages

based on the premise that the Secretarial Order was valid, even though it had been judicially determined not to be. Indeed, it was possible that the United States could remain liable on the basis of the stipulation and, at the same time, be subject to renewed tribal claims (such as a resurrected "fair and honorable dealings claim" predicated on a permanent loss of the boundary lands under the 1893 Agreement) under the Indian Claims Commission Act.

6. The Settlement Of The Quechan Tribe's Indian Claims Commission Act Suit

The Quechan Tribe ultimately submitted a proposal for settling the Tribe's claims under the Indian Claims Commission Act that provided a monetary payment for the Tribe's outstanding claims and, at the same time, resolved the United States' concern about continuing liability if the Secretarial Order were invalidated in collateral litigation. The United States accepted that proposal (after it was approved by a general membership meeting of the Tribe and by the Tribal Council), and the parties jointly submitted it for entry as a final judgment. See Stipulation for Settlement and Entry of Final Judgment (filed Aug. 5, 1983) (App., *infra*, 42a-62a). Under the terms of the final judgment, the United States agreed to pay the Quechan Tribe $15 million in full settlement of the Tribe's claims. *Id.* at 42a. The parties stipulated that the payment would constitute full satisfaction of all current and future liability, including—

> all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future

> action on the claim encompassed on Docket 320 * * *.[11]

Ibid. The United States and the Tribe additionally stipulated:

> The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purpose of precedent or argument in any other case.

Id. at 43a. The Claims Court found the proposed settlement equitable and just to both parties and entered it as a final judgment. See Final Judgment (entered Aug. 11, 1983) (App., *infra*, 66-67a). The Judgment recited the parties' stipulations concerning the preclusive effect of the judgment as between the Tribe and the United States. *Ibid.* The practical effect of the judgment is plain from the its terms and the stipulations of the parties.

First, the judgment granted the Tribe monetary relief on its outstanding claims. See App., *infra*, 66a. The United States' payment necessarily rested on the Secretarial Order, which recognized that the Tribe owned the disputed boundary lands and might be additionally entitled to compensation for a permanent loss of certain lands that remained in government ownership and for a temporary deprivation of the boundary lands. See note 7, *supra*; 46 Fed. Reg. at 11,375. That understanding is manifest in the documents that the parties submitted with their stipulations

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[11] Correspondingly, the stipulation also barred the United States from asserting any claims, offsets or counterclaims against the Tribe that had been or could have been asserted in Docket 320. See App., *infra*, 42a-43a.

and motion to approve the settlement, including "a copy of the letter approving the settlement of the litigation by the Department of the Interior." App., *infra*, 64a. That letter recognized that the Secretarial Order affirmed the Tribe's right to most of the lands in question and that the Tribe was seeking damages for a temporary loss of the use of those lands that terminated with the December 20, 1978, issuance of the Secretarial Order. See *id.* at 59a ("This case involves claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978.").

Second, the Claims Court judgment recognized, as this Court specifically noted in *Arizona II*, that the Secretarial Order would be subject to judicial challenge by third parties in other fora. App., *infra*, 67a. The parties' stipulations made clear that the Claims Court judgment was based on "a compromise and settlement" and "shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." *Ibid.* Those court-approved stipulations expressly affirmed the parties' understanding that the judgment, based on a compromise rather than adjudication of the issues, would not affect the parties' ability to litigate related issues—such as reserved water rights —in other fora.

Third, the judgment protected the United States from the prospect of future liability in the event that litigation in other fora resulted in the invalidation of the Secretarial Order. The judgment made clear that the Quechan Tribe "shall be barred thereby from asserting any further rights, claims, or demands against the [the United States] and any future action on the claims encompassed on Docket 320." App., *infra*, 67a. The Claims Court judgment thus definitively concluded the

Tribe's Indian Claims Commission Act suit against the United States. But that judgment was not intended, by any measure, to prevent the United States or the Tribe from asserting claims against *other* entities in *other* fora, including claims for reserved water rights in the *Arizona* v. *California* litigation for the very lands that, as both the United States and the Tribe agreed, continued to be held by the United States in trust for the Tribe.

Those provisions, read against the history of the Quechan land dispute, demonstrate that the Claims Court judgment does not preclude either the United States or the Tribe from asserting a water rights claim in the *California* v. *Arizona* litigation. The United States and the Quechan Tribe were able to reach a settlement of the Tribe's suit because the Secretarial Order established (at least as between the United States and the Tribe) that the Tribe owned the lands in question. The parties structured the compromise judgment to ensure that it would conclusively resolve the litigation between the United States and the Tribe, while allowing the United States and the Tribe to assert claims to reserved water rights for the lands in question.

B. THE MASTER MISUNDERSTOOD THE NATURE OF THE CLAIMS COURT'S JUDGMENT AND ITS LEGAL SIGNIFICANCE

The Master's conclusion that the Claims Court's judgment precludes the Tribe (and the United States) from pursuing water rights claims rests on a misunderstanding of that judgment and a misapplication of the legal principles governing claim and issue preclusion.

1. The Master Misunderstood The Nature Of The Claims Court's Judgment

The Master explained his rationale for rejecting the Quechan Tribe's claim for water rights in his Memorandum Opinion and Order No. 4. See McGarr Report App. 2(A). He first noted that the Claims Court's judgment was based on the stipulations of the United States and the Tribe, which stated that the Tribe would —

> ". . . be barred thereby from asserting any further rights, claims or demands against the defendant or any future action on the claims encompassed on docket no. 320 . . ."

and that the United States and the Tribe agreed to

> ". . . waive all rights to appeal from or otherwise seek review of such final determination . . ."

McGarr Report App. 2(A), at 10. The Master then stated:

> If the boundary lands claim of the Quechan Tribe here are lands also the subject of and part of Court Claims Docket No. 320, and I assume that this is so, the above quoted language precludes the Quechan Tribe from water rights claims based on boundary lands claims in this case.

Ibid. The Master additionally stated:

> The *ex parte* action of the Secretary in 1978 cannot be viewed as any way dispositive of this issue. The final order of the Court of Claims addresses itself to all the claims of the Tribe then pending, presumably including the land in issue here, and is not affected, as a final judicial decision, by an earlier administrative order.

Ibid.

The Master's reasoning overlooks the fact that the United States and the Tribe entered into a settlement precisely *because* they now agreed, in light of the Secretarial Order, that the Tribe owned the land in question. If there could be any doubt on that point, it is dispelled by the consistent position of the United States and the Tribe in this case ever since the December 20, 1978 date of the Secretarial Order—both prior to entry of the Claims Count's judgment, see *Arizona II*, 460 U.S. at 632, and thereafter—that there is a reserved water right for irrigable acreage within the boundary lands precisely *because* the Tribe owns those lands. Indeed, in light of that agreement between the United States and the Tribe, there could not even have been be a case or controversy, as between the United States and the Tribe in the Claims Court, over that issue. The only justiciable question that remained with respect to the boundary lands that are at issue in this case was the Tribe's right to compensation for the loss of the use of those lands prior to December 20, 1978, when the Secretary of the Interior formally recognized the Tribe's title to the lands. The United States' payment of $15 million represented a compromise of *that* claim.

The United States clearly and consistently made those points throughout the proceedings before the Master. The Master nevertheless failed to grasp their significance. When the United States emphasized those points in its motion for reconsideration, the Master suggested that the United States' position was a "newcomer on this long litigated scene," McGarr Report App. 2(B), at 2, and he then proceeded to dismiss the government's argument by misstating it:

> The United State certainly did not pay $15 million to the Quechan Tribe to settle a Court of Claims case which it believed was not pending because it had been mooted by a Solicitor's ruling many years before.

Ibid. As the United States had repeatedly explained to the Master, the $15 million payment was made primarily to compensate the Tribe for a temporary deprivation of the boundary lands at issue in this litigation—lands that, under the Secretarial Order, the Tribe continued to own. See Opening Memorandum of the United States 20-22; Reply Memorandum of the United States at 9-12; Motion for Reconsideration of the United States, at 1-5; Reply Memorandum of the United States on Motion for Reconsideration at 1-9. Indeed, Secretary Watt's Secretarial Order, like the 1978 Secretarial Order, specifically acknowledged that the United States might be required to make such a payment. See 46 Fed. Reg. at 11,375 ("Nothing contained herein shall prevent the Tribe from recovering whatever compensation it may be determined is appropriate in any proceeding now pending or hereafter brought against the United States for past use of such lands.").

The Master's Memorandum Opinions and Orders accordingly demonstrate that the Master had a flawed understanding of the Claims Court's judgment. For that reason alone, his recommendation is erroneous and should be overruled. In addition to that flaw, however, the Master also incorrectly applied hornbook principles of claim and issue preclusion to reject the Tribe's claim.

2. The Master Misapplied Settled Law Respecting Claim And Issue Preclusion

The Master concluded that the Claims Court's judgment, which was based on a settlement between the

United States and the Quechan Tribe of the Tribe's outstanding Indian Claims Commission Act claims, precluded the Tribe from claiming reserved water rights for the lands at issue in that case. That conclusion rests on a mistaken understanding of the law.

The principle of res judicata recognizes that, as a general matter, a "valid and final personal judgment is conclusive between the parties." Restatement (Second) Judgments § 17 (1982). That principle embraces the concept of "claim preclusion,"—sometimes referred to as the rules of merger and bar—which generally bar parties from litigating claims against one another that were or could have been advanced in an earlier proceeding. See *id.* § 17 cmts. a-b. It also embraces the concept of issue preclusion—sometimes referred to as collateral estoppel—which generally bars parties from relitigating issues arising from the same or different claims. See *id.* § 17, cmt. c. See, *e.g.*, *State* v. *Kerr McGee Corp.*, 898 P.2d 1256 (N.M. Ct. App. 1995) (applying the concepts of claim and issue preclusion to an Indian Claims Commission Act judgment).

Under principles of claim preclusion, the Claims Court's judgment precludes the Quechan Tribe from relitigating the claims the Tribe asserted against the United States in the proceedings under the Indian Claims Commission Act. That result is embodied in the express terms of the judgment itself, which provides that the Quechan Tribe is barred from asserting any claim that the Tribe "has asserted or could have asserted" against the United States in those proceedings. And the judgment goes on to provide that the United States similarly is barred from asserting against the Tribe any claim, counterclaim, or offset the United States "has asserted or could have asserted" against the Tribe in the Indian Claims Commission Act proceedings. App., *infra*, 67a. Nothing in the judgment purports to bar either the United States or the Tribe from asserting *different* claims against *other* parties in *other* fora, and the judgment's express provision for only a narrower preclusive effect as between the parties would seem to foreclose such a result. Nor is the assertion of such claims by either the United States or the Tribe barred by principles of claim preclusion, either with respect to judgments in general or with respect to judgments under the Indian Claims Commission Act in particular.[12] The principles of claim preclusion accordingly pose no bar to the claim by the United States and the Quechan Tribe for reserved water rights in this original action. The Tribe's Indian Claim Commission Act claims, which can be asserted only against the United States for a money judgment, are different from the claims asserted by the United States and the Tribe for a judicial declaration of reserved water rights

[12] Section 22(a) of the Indian Claims Commission Act, § 22(a), 60 Stat. 1055, 25 U.S.C. 70u(a) (1976), provides that "payment of any claim * * * shall be a full discharge *of the United States* of all claims and demands touching any of the matters involved in the controversy" (emphasis added). See *United States* v. *Dann*, 470 U.S. 39, 45 (1985). Section 22(a) also provides that a report by the Commission to Congress determining that the claimant is entitled to recover "shall have the effect of a final judgment of the Court of Claims." The effect of a judgment of the Court of Claims (now the Court of Federal Claims) is prescribed by 28 U.S.C. 2519, which provides: "[a] final judgment of the United States Court of Federal Claims against any plaintiff shall forever bar any further claim, suit, or demand *against the United States* arising out of the matters involved in the case or controversy" (emphasis added). See *Dann*, 470 U.S. at 45 & n.10. The statutory provisions governing the effect of the Claims Court's judgment thus reinforce the conclusion that that judgment does not bar claims *by* the United States (or by the Tribe) against third parties.

for lands that the United States holds in trust for the Tribe. See, *e.g.*, *Kerr-McGee*, 898 P.2d at 1259-1260.

Under principles of issue preclusion, the Claims Court's judgment would generally prevent the United States and Quechan Tribe from relitigating between themselves an issue that was "actually litigated and determined if its determination was essential to that judgment." Restatement (Second) Judgments § 17(3) (1982); see also *id.* § 27 (restatement of the general rule); *id.* § 28 (exceptions). The application of issue preclusion is not necessarily limited, however, to litigation between the original parties; in some circumstances, it can also prevent parties from relitigating an issue in a later suit involving persons who did not participate in the original proceedings. See *id.* § 29; but see *United States* v. *Mendoza*, 464 U.S. 154 (1984) (nonmutual collateral estoppel does not apply against United States). We therefore may assume, *arguendo*, that in some circumstances a Claims Court judgment in a case such as this could prevent the Tribe concerned from relitigating issues that were decided by the Claims Court with persons who are parties in other litigation, such as the *Arizona* v. *California* water-rights litigation involved here. See *ibid.* But issue preclusion applies only if the issue at stake was "actually litigated and necessary to the outcome of the first action." *Parklane Hoisery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979); see, *e.g.*, *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 463-464 (1998) ("Absent actual and adversarial litigation * * *, principles of issue preclusion do not hold fast."); *Cromwell* v. *County of Sac*, 94 U.S. 351, 353 (1877) ("[T]he judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted. * * * [T]he inquiry must always be as to the point or question actually litigated."); see also *Brown* v. *Felson*, 442 U.S. 127, 139 n.10 (1979); *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Here, that essential precondition is not satisfied.

The Claims Court judgment does not preclude litigation in this original action of the existence of reserved water rights for the Fort Yuma Reservation, because that judgment did not result in the actual litigation of any issue that would collaterally estop either the United States or the Tribe from claiming that the United States holds the boundary lands in trust for the Tribe and that reserved water rights should be recognized for those lands. The Claims Court did not decide whether the Quechan Tribe owned the boundary lands or whether those lands included reserved water rights. The court entered its judgment "based on a compromise and settlement," and it expressly stated that the judgment "shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." App., *infra*, 67a. See *Kerr-McGee Corp.*, 898 P.2d at 1260; see *id.* at 1260-1264 (rejecting the argument that a compromise judgment of land claims under the Indian Claims Commission Act precluded the Tribe from litigating its water rights respecting those lands); see also *Devils Lake Sioux Tribe* v. *North Dakota*, 917 F.2d 1049, 1055-1056 (8th Cir. 1990) (interpreting an ambiguous Indian Claims Commission Act settlement as not precluding the Tribe's claim to a lakebed where the United States acknowledged that the lakebed had not been taken and no compensation had been paid for it).

As a general matter, "a judgment entered by confession, consent, or default" cannot result in issue preclusion because "none of the issues is actually litigated." Restatement (Second) Judgments § 27 cmt. e (1982). Accord 1B James Wm. Moore, *Moore's Federal*

Practice ¶ 0.443[3], at 814 (1988) ("collateral estoppel in its usual connotation should not result from a consent judgment, because the requisite litigation and judicial determination of issues are normally not present"). Here, the United States and the Tribe settled the Tribe's Indian Claim Commission Act claims because the Department of the Interior determined that the Tribe owned the disputed boundary lands. By virtue of the government's concession, there remained no controversy between the United States and the Tribe respecting that issue. See pages 27-28, *supra*. As the New Mexico Court of Appeals correctly recognized in analogous circumstances, "a consent judgment usually falls short of a full-blown contested adjudication of all issues, so that the end result, being achieved by negotiation, may well include matters that were not actually and necessarily decided by the court." *Kerr-McGee Corp.*, 898 P.2d at 1260.

Quite aside from the fact that the Claims Court's judgment was entered on the basis of a settlement, there is simply no basis for inferring that the Claims Court adjudicated any issue respecting the Tribe's title to the boundary lands or the existence of reserved water rights for those lands. The judgment is entirely silent on those matters. It is hornbook law that an "opaque judgment fails to preclude relitigation." 18 Charles Alan Wright, et al., *Federal Practice and Procedure* § 4420, at 184 (1981). "The first rule for identifying the issues to be precluded is that if there is no showing as to the issues that were actually decided, there is no issue preclusion. The burden is on the party

asserting preclusion to show actual decision of the specific issues involved." *Id.* § 4420, at 184-185.[13]

The stipulations of the United States and the Quechan Tribe provide no basis for precluding litigation of the Tribe's water rights. To the contrary, those stipulations, together with the Secretarial Order and this Court's decision in *Arizona II*, manifest agreement between the United States and the Tribe that the Tribe owns the boundary lands and that the United States and the Tribe would be entitled to assert a claim for reserved water rights for those lands in these proceedings and have that claim decided on the merits. See pages 24-26, 28, 30-33, *supra*. It is simply inconceivable that the United States and the Tribe would have consented to entry of the judgment by the Claims Court if the effect of that judgment were to deny the United States and the Tribe any opportunity to establish the existence of reserved water rights for the very lands that both parties agree are held by the United States for the benefit of the Tribe.

For the foregoing reasons, the Master has misapplied the doctrines of claim and issue preclusion and has unfairly denied the United States and the Tribe of their day in court.

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[13] Indeed, the lower courts commonly state that "[t]he party seeking to preclude litigation of an issue has the burden of showing with clarity and certainty that the issue was actually and necessarily determined; if the basis of the prior decision is unclear, subsequent litigation may proceed." *Kerr-McGee Corp.*, 898 P.2d at 1260; accord *Clark* v. *Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992); *Connors* v. *Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992); *Ottley* v. *Sheepshead Nursing Home*, 784 F.2d 62, 65 (2d Cir. 1986).

C. THIS CASE SHOULD BE REMANDED TO THE MASTER FOR A DETERMINATION OF THE EXISTENCE AND QUANTIFICATION OF RESERVED WATER RIGHTS FOR THE BOUNDARY LANDS

The United States submits that the Master properly recommended approval of the settlements respecting the Fort Mojave and the Colorado River Indian Reservations, but erred in failing to determine the existence of reserved water rights for the boundary lands at issue in this case. We therefore submit that, while it would be appropriate for the Court to enter a supplemental decree at this time respecting reserved water rights for the Fort Mojave and Colorado River Reservations, the water rights claims for the Fort Yuma Reservation should be remanded to the Master for determination on the merits. The United States remains hopeful that the parties may be able to negotiate a proposed settlement of those claims, but if a settlement proves elusive, then the United States and the Tribe are entitled to have those claims adjudicated. The question of the existence of reserved water rights for the boundary lands basically turns on whether the 1893 Agreement made the Tribe's cession of the lands at issue conditional on the government's performance of its undertakings and, if so, whether the government failed to fulfill its obligations. The measure of the water rights asserted here, as in the case of the other Indian water rights involved in *Arizona* v. *California*, is the practicably irrigable acreage standard.

The water rights claims for the boundary lands of the Fort Yuma Reservation constitute the only outstanding issues that remain to be decided in *Arizona* v. *California*. Upon final determination of those claims, the

Court will be able to enter a final consolidated decree and bring this suit to a close.

CONCLUSION

The exception of the United States to the Report of the Special Master should be sustained.

Respectfully submitted.

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DECEMBER 1999

APPENDIX A

Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286

* * * * *

AGREEMENT WITH THE YUMA INDIANS IN CALIFORNIA

SEC. 17. Whereas Washington J. Houston, John A. Gorman, and Peter R. Brady, duly appointed commissioners on the part of the United States, did on the fourth day of December, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Yuma Indians in the State of California, which said agreement is as follows:

Articles of agreement made and entered into this 4th day of December, A.D. 1893, at Fort Yuma, on what is known as the Yuma Indian Reservation, in the county of San Diego, State of California, by Washington J. Houston, John A. Gorman, and Peter R. Brady, commissioners on the part of the United States appointed for the purpose, and the Yuma Indians.

ARTICLE I.

The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim and interest in and to and over the following described tract of country in San Diego, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows:

"Beginning at a point in the middle of the channel of the Colorado River, due east of the meander corner to

sections nineteen and thirty, township fifteen south, range twenty-four east, San Barnardino meridian; thence west on the line between sections nineteen and thirty to the range line, between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen south, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sixteen south, range twenty-one east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided, however*, That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made.

"It is also hereby ordered that the Fort Yuma military reservation be, and the same is hereby, transferred to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order, said military reservation having been abandoned by the War Department for military purposes."

ARTICLE II.

Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five acres of land, which shall be allotted to such Indians in severalty. Each member of said band of Indians over the age of eighteen years shall be entitled to select his or her land, and the father, or, if he be dead, the mother, shall select the land herein provided for for each of his or her children who may be under the age of eighteen years; and if both father and mother of the child under the age of eighteen years shall be dead, then the nearest of kin over the age of eighteen years shall select and locate his or her land; or if such persons shall be without kindred, as aforesaid, then the Commissioner of Indians Affairs, or some one by him authorized, shall select and locate the land of such child.

ARTICLE III.

That the allotments provided for in this agreement shall be made, at the cost of the United States, by a special agent appointed by the Secretary of the Interior for the purpose, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and within sixty days after such special agent shall appear upon said reservation and give notice to the said Indians that he is ready to make such allotments; and if anyone entitled to an allotment hereunder shall fail to make his or her selection within said period of sixty days then such special agent shall proceed at once to make such selection for such person or persons, which shall have the same effect as if made by the person so entitled; and when all of said allotments are made and approved, then all of the residue of said

reservation which may be subject to irrigation, except as hereinafter stated, shall be disposed of as follows: The Secretary of the Interior shall cause the said lands to be regularly surveyed and to be subdivided into tracts of ten acres each, and shall cause the said lands to be appraised by a board of three appraisers, composed of an Indian inspector, a special Indian agent, and the agent in charge of the Yuma Indians, who shall appraise said lands, tracts, or subdivisions, and each of them, and report their proceedings to the Secretary of the Interior for his action thereon; and when the appraisement has been approved the Secretary of the Interior shall cause the said lands to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof, first having given at least sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers of general circulation; and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders then the Secretary of the Interior may sell the same at private sale at not less than the appraised value.

ARTICLE IV.

That the money realized by the sale of the aforesaid lands shall be placed in the Treasury of the United States, to the credit of the said Yuma Indians, and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress, or to application, by order of the President, for the payment of water rents, building of levees, irrigating ditches, laterals, the erection and repair of

buildings, purchase of tools, farming implements and seeds, and for the education and civilization of said Yuma Indians.

ARTICLE V.

Upon the approval of the allotments provided for herein by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his or her decease, to his or her heirs or devisees, according to the laws of California, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs or devisees, as aforesaid in fee, discharged of said trust and free of all incumbrance whatsoever.

And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. And during said period of twenty-five years these allotments and improvements thereon shall not be subject to taxation for any purpose, nor subject to be seized upon any execution or other legal process, and the law of descent and partition in force in California shall apply thereto.

ARTICLE VI.

All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States.

ARTICLE VII.

There shall be excepted from the operation of this agreement a tract of land, including the buildings, situate on the hill on the north side of the Colorado River, formerly Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm not to exceed in all one-half section, or three hundred and twenty acres.

ARTICLE VIII.

This agreement shall be in force from and after its approval by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

WASHINGTON J. HOUSTON, [SEAL.]

JOHN A. GORMAN, [SEAL.]

PETER R. BRADY, [SEAL.]

Commissioners on the part of the United States.

BILL MOJAVE, and others.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of making the allotments provided for in said agreement, including the payment and expenses of the necessary special agent hereby authorized to be appointed by the Secretary of the Interior, and for the necessary resurveys, there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of two thousand dollars, or so much thereof as may be necessary.

That for the purpose of defraying the expenses of the survey and sale of the lands by said agreement relinquished and to be appraised and sold for the benefit of said Indians, the sum of three thousand dollars, or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the same to be reimbursed to the United States out of the proceeds of the sale of said lands.

That the right of way through the said Yuma Indian Reservation is hereby granted to the Southern Pacific Railroad Company for its line of railroad as at present constructed, of the same width, with the same rights and privileges, and subject to the limitations, restrictions, and conditions as were granted to the said company by the twenty-third section of the Act approved March third, eighteen hundred and seventy-one, entitled "An Act to incorporate the Texas Pacific Railroad

Company, and to aid in the construction of its road, and for other purposes:" *Provided*, That said company shall, within ninety days from the passage of this Act, file with the Secretary of the Interior a map of said right of way, together with a relinquishment by said company of its right of way through said reservation as shown by maps of definite location approved January thirty-one, eighteen hundred and seventy-eight.

The Secretary of the Interior is hereby authorized and directed to cause all the lands ceded by said agreement which may be susceptible of irrigation, after said allotments have been made and approved, and said lands have been surveyed and appraised, and the appraisal approved, to be sold at public sale, by the officers of the land office in the district wherein said lands are situated, to the highest bidder for cash, at not less than the appraised value thereof, after the first having given at least sixty days' public notice of the time, place, and terms of sale immediately prior to such sale, by publication in at least two newspapers of general circulation, and any lands or subdivision remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidder, then the Secretary may cause the same to be sold at private sale at not less than the appraised value. The money realized from the sale of said lands, after deducting the expenses of the sale of said lands, and the other money for which provision is made for the reimbursement of the United States, shall be placed in the Treasury of the United States to the credit of said Yuma Indians, and shall draw interest at the rate of five per centum per annum, and said principal and interest shall be subject to appproprtion

by Congress, or to application by the President of the United States for the payment of water rents, the building of levees, irrigating ditches and laterals, the purchase of tools, farming implements, and seeds, and for the education and civilization of said Indians: *Provided, however*, That none of said money realized from the sale of said lands, or any of the interest thereon, shall be applied to the payment of any judgment that has been or may hereafter be rendered on claims for damages because of depredations committed by said Indians prior to the date of the agreement herein ratified.

That all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws.

That the Colorado River Irrigating Company, which was granted a right of way for an irrigating canal through the said Yuma Indian Reservation by the Act of Congress approved February fifteenth, eighteen hundred and ninety-three, shall be required to begin the construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act aforesaid shall be forfeited.

That the Secretary of the Interior shall have authority from time to time to fix the rate of water rents to be paid by the said Indians for all domestic, agricultural, and irrigation purposes, and in addition thereto each male adult Indian of the Yuma tribe shall be granted water for one acre of the land which shall be allotted to

him, if he utilizes the same in growing crops, free of all rent charges during the period of ten years, to be computed from the date when said irrigation company begins the delivery of water on said reservation.

APPENDIX B

BEFORE THE

Indian Claims Commission

OF THE UNITED STATES

DOCKET NO. 320

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION FOR LOSS OF RESERVATION

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BEFORE THE

Indian Claims Commission

OF THE UNITED STATES

DOCKET NO. 320

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION FOR LOSS OF RESERVATION

First Cause of Action

Jurisdiction

1. The Quechan Tribe of the Fort Yuma Reservation, California, is and has been since time immemorial a tribe of American Indians residing within the present territorial limits of the United States. The Quechan Tribe commonly is known as the Yuma Tribe or the Yuma Indians, and all references in government reports and elsewhere to said Yuma Tribe of Indians in fact apply to the Petitioner. The terms "Petitioner", "members of the Petitioner", "Quechans", and "Quechan Indians" are used interchangeably in this petition.

2. In accordance with a constitution adopted pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 (49 Stat. 984), and approved by the Secretary of the Interior on or about December 18,

1936, the Petitioner possesses a Tribal Council which is recognized by the Secretary of the Interior as the tribal organization having exclusive authority to represent and act for the Petitioner, and this action is instituted by and under the direction of said Quechan Tribal Council.

3. No group of individuals or tribal organization other than said Quechan Tribal Council is recognized by any department, office or other agency of the United States Government as having authority to represent, or act in the name of the Petitioner, and the Petitioner is not a member of any organization or other identifiable group having authority to act on behalf of the Petitioner in the matters with which this petition deals.

4. Petitioner is represented in this proceeding by its attorneys, Williamson, Hoge & Curry, 417 South Hill Street, Los Angeles, California, and McCarter, English & Studer, 11 Commerce Street, Newark, New Jersey, according to the terms of a written contract of employment with McCarter, English & Studer aforesaid, duly executed on behalf of the Petitioner and filed with and approved by the Commissioner of Indian Affairs on March 15, 1950, under Symbol I-1-Ind. 42263 and recorded in Volume 17 of Miscellaneous Records at page 27.

5. Petitioner files the claim asserted herein pursuant to the Act of Congress of August 13, 1946 (60 Stat. 1049), hereinafter referred to as the Act, and in accordance with the General Rules of Procedure promulgated by the Indian Claims Commission.

6. The claim presented herein accrued prior to August 13, 1946, and arises from the expropriation of

the greater part of a reservation on the California side of the Colorado River, established for the Petitioner by an Executive Order dated January 9, 1884, of President Arthur (a true and correct copy thereof being annexed hereto and made a part hereof as Exhibit A).

7. No suit is pending in the Court of Claims or the Supreme Court of the United States with respect to said claim, nor has said claim been filed in the Court of Claims under legislation existing at, or prior to, the date of the approval of said Act. No part of said claim has heretofore been adjudicated or acted upon by Congress, by any department of the United States Government, or by any commission, agency or court of the United States. Petitioner, has filed before the Indian Claims Commission a Petition for a General Accounting and a Land Petition (Docket Nos. 86 and . . . respectively).

8. Petitioner reserves its rights under Section 7(a)(2) and Section 13 of the aforementioned General Rules of Procedure to file further petitions or to amend the instant petition asserting claims under Section 2 of the Act based upon the same facts or upon additional events and circumstances, whether in the alternative or otherwise, and whether or not they may be deemed consistent with the claim set forth herein.

Subject Matter of this Proceeding

9. By Executive Order dated July 6, 1883, President Chester A. Arthur carved out for the use and occupancy of the Quechans and other Indians a tract of land on the Arizona side of the Colorado River within the area which had been owned by the Petitioner since time immemorial.

10. Pursuant to the aforesaid Executive Order dated January 9, 1884, President Arthur restored said territory to the public domain and in lieu thereof set aside a tract of land on the California side of the Colorado River "as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon" (herein referred to as the "Reservation"). Said Reservation contained approximately 45,000 acres. All of the land therein was then, and since time immemorial had been, owned by the Petitioner, and comprised but a small part of Petitioner's original domain.

11. By the General Allotment Act of February 8, 1887 (24 Stat. 388), as amended by the Act of February 28, 1891 (26 Stat. 794), the Defendant determined that Indians, including the members of the Petitioner, were entitled, upon allotment of their reservations, to 80 acres of land for each man, woman and child, or, with respect to lands "only valuable for grazing purposes," to 160 acres each.

12. The population of the Petitioner in 1893 was reported by the Commissioner of Indian Affairs as not less than 1,084. The greater part of the 45,000 acre Reservation was valuable only for grazing purposes. The Reservation thus was inadequate to provide for the statutory allotments to the Quechan Indians if, as and when said area was allotted. Under such circumstances, the aforementioned General Allotment Acts authorized the agents of the Defendant to reduce the allotment of each member of the Petitioner to a figure representing the proportionate share of each of said 1,084 Quechan Indians in the 45,000 acres available for distribution; in the alternative, said Acts authorized the

agents of the Defendant to allot 80 acre and 160 acre tracts within said Reservation to a fraction of the membership of the Petitioner, and the remainder of said Indians would then be entitled, without payment of any fee, to receive allotments in similar amounts, "upon and surveyed or unsurveyed lands of the United States not otherwise appropriated," including the territory surrounding the Reservation. Under the aforementioned statutes, the members of the Petitioner also were entitled to receive trust patents upon allotment and to receive patents in fee "free of all charge or incumbrance whatsoever" twenty-five years after the date of allotment.

13. Notwithstanding the foregoing, the Defendant, on December 4, 1893, entered into an alleged "agreement with the principal men and other male adults of the Yuma Indians in the State of California," (hereinafter referred to as the "Agreement of 1893," a true and correct copy of which is annexed hereto as Exhibit B). Upon information and belief, the Defendant never advised the Petitioner of its rights under the aforementioned General Allotment Acts, or that Petitioner was the owner of all lands in said Reservation, but, on the contrary, agents of the Defendant, taking advantage of the ignorance of the Quechan Indians, used their positions of guardianship and control to persuade the Petitioner to surrender, without compensation, the greater part of the Reservation to which it was lawfully entitled. In order to accomplish this purpose, agents of the Defendant threatened the members of the Petitioner that, unless they agreed to accept 5 acres of irrigable land per person and to relinquish the remainder of the Reservation, they would be entirely deprived of their lands. The agents of the Defendant

carried out this threat by striking from the rolls of the Quechan Tribe numerous individuals who refused to sign said agreement.

14. The irrigable lands contained within said Reservation were valuable and desirable for agricultural purposes. The non-irrigable lands contained in said Reservation included valuable deposits of sand and gravel, areas important for right of way purposes, lands along the riverbank which had the prospect of accretion, and were otherwise of value.

15. Said agreement of 1893 was wholly nugatory since (a) no consideration whatsoever was received by the Petitioner from the Defendant for the surrender of the greater portion of said Reservation, inasmuch as the amounts of land promised to the members of the Petitioner upon allotment were substantially smaller in size than the tracts to which said Indians would have been entitled under the General Allotment Acts if they had made no agreement at all, and for the further reason that all of the land in said Reservation was owned by Petitioner, and that no conveyance or allotment thereof by the Defendant could furnish consideration to the Petitioner; and (b) the signatures of most of all of the signers of said Agreement were either (1) forged, or (2) coerced by force or the threat of physical violence, including the imprisonment of one of the principal opponents of the measure, or (3) coerced under the threat of deprivation of land rights, or (4) secured by misrepresentation as to the effect of the Agreement and also concealment by the agents of the Defendant of the fact that without any agreement any allotments made to the members of the Petitioner would have been

in substantially larger amounts than said Agreement provided.

16. Said Agreement of 1893 was further nugatory because, at all times during the negotiation and conclusion thereof, the following conditions existed: (a) the agents of the Defendant misled the Quechan Indians into believing that they would have free water for their lands in perpetuity, and otherwise failed or refused to inform or misled the Petitioner as to the meaning of the provisions of the Agreement; (b) the interpreter for the Indians was an employee of the agents of the Defendant and was incompetent to explain the proceedings to the Petitioner; (c) the members of the Petitioner were ignorant of the English language and said Agreement contained words for which no comparable term or concept existed in the Quechan tongue; and (d) the members of the Petitioner, although unfamiliar with the economy of the white man, were not advised or assisted by counsel in their dealings with the Defendant, and no legal or other disinterested advice was made available to them.

17. After negotiating the alleged Agreement of 1893, the Defendant unilaterally altered said Agreement in material respects by the Act of August 15, 1894 (28 Stat. 286, 332). In said amendments, Congress ordered the expenses of survey and sale of certain lands to be deducted from funds due the Petitioner, and granted a right of way across the Reservation to the Southern Pacific Railroad Company in accordance with prior grants under the Acts of July 27, 1866 (14 Stat. 292, 299), and March 3, 1871 (16 Stat. 573, 579). These changes were never submitted to the Petitioner for its

approval, and no compensation was paid to the Petitioner therefor.

18. By the Act of April 21, 1904 (33 Stat. 189, 224), as amended by the Act of March 3, 1911 (36 Stat. 1058, 1063), the Defendant again altered the Agreement of 1893. In such legislation, the Defendant declared irrigable lands within the Reservation reclaimed by the diversion of the Colorado River to be within the public domain. This legislation also increased the allotments of members of the Petitioner to ten acres of irrigable land, but provided that the cost of irrigation be reimbursed to the Defendant from any funds received upon the sale of the surplus lands of the Reservation or from any other fund which might become available for such purpose, and provided that unpaid costs of the irrigation project be held to constitute a first lien on such allotments upon issuance of a patent in fee. These stipulations were enacted without the consent of the Petitioner, without compensation to the Petitioner, and in violation not only of the guarantee of the aforementioned General Allotment Acts, but also of said Agreement of 1893, pledging that patents in fee "free of al incumbrance whatsoever" wold be issued to the allotees twenty-five years after the date of allotment.

19. The aforementioned conduct of the Defendant constituted a taking of lands belonging to the Petitioner without payment of just compensation, in violation of the Fifth Amendment to the Constitution, for which recovery is authorized under Section 2(1) and Section 2(4) of the Act.

20. In determining the amount of recovery to which the Petitioner may be entitled hereunder, and by reason of the causes of action herein set forth, the Peti-

tioner should be allowed interest or else there should be given effect to the fact that subsequent to the occurrence of the events which are the subject of this petition, there has been a substantial decrease in the value of the dollar and in its purchasing power, so that the present dollar is not, as a measure of value, the equivalent of the then dollar, and therefore, an appropriate adjustment increasing the amount of recovery should be made in respect thereof.

As and for a Second and Alternative Cause of Action

21. For a second and alternative cause of action, the Petitioner realleges each and every allegation contained in Paragraphs 1 through 18 inclusive, and also in Paragraph 20, and makes them a part hereof.

22. The aforementioned conduct of the Defendant constituted an appropriation of lands belonging to the Petitioner for an unconscionable consideration and under conditions of fraud and duress, for which recovery is authorized under Section 2(3) of the Act.

As and for a Third and Alternative Cause of Action

23. For a third and alternative cause of action, the Petitioner realleges each and every allegation contained in Paragraphs 1 through 18 inclusive, and also in Paragraph 20, and makes them a part hereof.

24. Under the facts and circumstances so set forth, standards of fair and honorable dealings required that, in addition to performing other duties, the Defendant (1) protect the Petitioner in the use and possession of its property; (2) advise the Petitioner specifically and promptly of its rights under the General Allotment

Acts; (3) safeguard the Petitioner from imposition in its dealings with the United States (4) refuse to sacrifice the interests of the Petitioner for the benefit of the Defendant and non-Indian citizens thereof; (5) refrain from unilaterally altering its obligations to the Petitioner; and (6) account to the Petitioner for the profits realized or the benefits obtained by the Defendant upon disposition of the lands and other property here involved.

25. The aforementioned acts and omissions of the Defendant were contrary to its moral obligations to protect the Petitioner and in violation of standards of fair and honorable dealings, for which recovery is authorized under Section 2(5) of the Act.

As and for a Fourth and Separate Cause of Action

26. For a fourth and separate cause of action, the Petitioner realleges each and every allegation contained in Paragraphs 1 through 18 inclusive, and also in Paragraph 20, and makes them a part hereof.

27. After the establishment of the 1884 Quechan Reservation, but prior to August 15, 1894, the Defendant, without the consent of, or payment of any consideration to, the Petitioner, granted rights of way across said Reservation to the Yuma Pumping Irrigation Company by virtue of the Act of January 20, 1893 (27 Stat. 420), and to the Colorado River Irrigation Company by virtue of the Act of February 15, 1893 (28 Stat. 456), and otherwise appropriated lands within said Reservation pursuant to statutes largely unknown to the Petitioner but well-known to the Defendant.

28. The foregoing acts of the Defendant constituted a taking of the Petitioner's lands for public use without payment of just compensation agreed to by the Petitioner, in violation of the Fifth Amendment to the Constitution, by reason whereof the Petitioner is entitled to recovery under Section 2(1) and Section 2(4) of the Act.

Prayer

WHEREFORE, The Petitioner prays:

A. For a determination that the Defendant be required to make a full and true discovery and disclosure of all land and other property within the 1884 Reservation owned by the Petitioner and taken by the Defendant for public use, and for a determination that said land and property was wrongfully taken by the Defendant;

B. For a determination that the Defendant be required to make a full and true discovery and disclosure of all land and other property within the 1884 Reservation owned by the Petitioner and otherwise acquired by the Defendant, and for a determination that said land and property was wrongfully acquired by the Defendant;

C. For a determination that the Defendant is obligated to compensate the Petitioner for the land and other property wrongfully appropriated as aforesaid;

D. For a determination of the just compensation therefor;

E. That judgment be entered in favor of the Petitioner for the amount so determined, with appropriate

adjustments for the decline in the value of the dollar and for the reasonable use value of the land from the time of its loss, with interest to the date of the payment of the judgment;

F. That the Petitioner have such other and further relief as to this Commission may appear just and equitable.

Respectfully submitted,

NICHOLAS CONOVER ENGLISH,
Attorney of Record for the Quechan Tribe of the Fort Yuma Reservation, California,
11 COMMERCE STREET,
NEWARK 2, NEW JERSEY

WILLIAMSON, HOGE & CURRY,
417 South Hill Street,
Los Angeles 13, California,
of Counsel.

MCCARTER, ENGLISH & STUDER,
11 Commerce Street,
Newark 2, New Jersey,
of Counsel.

APPENDIX C

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 320

THE QUECHAN TRIBE OF THE
FORT YUMA RESERVATION, CALIFORNIA, PETITIONER

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 24, 1958]

AMENDMENT TO PETITION FOR LOSS OF RESERVATION

Pursuant to order of the Commission dated April 24, 1958, the Petitioner files this amendment to its original petition, supplementing said petition by adding certain new, causes of action thereto as follows:

FIFTH, SEPARATE, AND ALTERNATIVE CAUSE OF ACTION

29. For a fifth, separate, and alternative cause of action the Petitioner realleges the allegations contained in Paragraphs 1 to 3, inclusive, and in Paragraphs 5 and 7, of its original petition on file herein and makes them a part hereof.

30. On or about December 4, 1893, the Defendant entered into an agreement with the Yuma Indians that

is to say, the Quechan Indians, represented by the Petitioner herein, which agreement was ratified by the Act of Congress of August 15, 1894 (28 Stat. 286, 332). Said agreement is sometimes hereinafter referred to as the "1893 Agreement". A true and correct copy of the 1893 Agreement is attached to the original petition on file herein and marked Exhibit B.

31. Petitioner is informed and believes, and upon that ground, alleges that the Defendant has defaulted in its obligations under the 1893 Agreement in the following regards:

(a) Defendant has failed: (1) to make allotments to such Quechan Indians as selected tracts of land at the cost of the United States; (2) to make allotments for such Quechan Indians as failed to make a selection within 60 days; and (3) to survey, subdivide and appraise all irrigable lands contained in the Reservation established by Executive Order dated January 9, 1884 and not thus allotted, and to sell such lands at public or private sale; all as provided by Article III of the 1893 Agreement.

(b) Defendant has failed to realize an adequate sale price for the aforesaid irrigable lands, and to credit Petitioner with the adequate sale price of such lands as Defendant undertook to do by Article IV of the 1893 Agreement.

(c) Defendant has failed to hold the aforementioned allotments in trust for 25 years for the benefit of the individual members of

Petitioner, to whom such allotments had been made, and to convey a patent in fee to the respective members of Petitioner, discharged o such trust and free of all encumbrances whatever, as Defendant undertook to do by Article V of the 1893 Agreement.

32. The details of such breaches of contract are not known to the Petitioner but are well known to the Defendant.

WHEREFORE, the Petitioner prays that, in addition to the relief prayed for in the original petition on file herein, the Defendant be required to make a full and true discovery and disclosure of all its transactions in carrying out the obligations which Defendant undertook by Articles III, IV and V of the 1893 Agreement; and that, if the Commission determines that the 1893 Agreement is a valid and binding agreement, the petitioner be allowed such damages for any breach or breaches thereof by the Defendant as the Commission may find to have occurred.

Respectfully submitted,

FULTON W. HOGE,

Attorney of Record for the
Quechan Tribe of the Fort Yuma
Reservation, California
4648 Melbourne Avenue
Los Angeles 27, California

HOGE, PERRY & PATTERSON
4648 Melbourne Avenue
Los Angeles 27, California
Of Counsel

LOUIS L. ROCHMES, ESQ.
711 Fourteenth Street, N. W.
Washington, 5, D. C.
Of Counsel

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

Louise Rousseau, being first duly sworn, deposes and says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years; and that affiant's address is: 4042 Denny Avenue, North Hollywood, California; that on the *20th* day of June, 1958, affiant served the above and foregoing Amendment to Petition For Loss of Reservation by mailing four (4) copies of the same, postage prepaid, to:

The Attorney General
Attention: Ralph A. Barney, Esq.
United States Department of Justice
Washington, 25, D. C.

Subscribed and sworn to before
me this _____ day of June, 1958.

Notary Public in and for said
County and State

APPENDIX D

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 320

THE QUECHAN TRIBE OF THE
FORT YUMA RESERVATION, CALIFORNIA, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Decided: July 21, 1971]

OPINION ON MOTION TO REOPEN THE RECORD AND TO VACATE ORDER STAYING FURTHER PROCEEDINGS

Kuykendall, Chairman, delivered the opinion of the Commission.

On April 29, 1963, the Commission issued an order closing the record in this case on proof of title. On November 25, 1970, the Commission issued an Order staying further proceedings pending the outcome of legislation then before Congress.[1] The proposed legislation was never enacted and has not been reintroduced.

[1] The proposed legislation sought the return of the property in issue in this case, to the Quechan Indians.

On April 21, 1971, the plaintiff filed a motion to reopen the record on liability and to vacate the order staying further proceedings. It appears that plaintiff's counsel at the time of the 1962 title hearing has since died. The plaintiff, through its present attorney, operating under an attorney contract dated February 10, 1971, and approved by the Secretary of the Interior, alleges in support of the motion to reopen that the original petition filed in 1951 charged that on December 4, 1893, the defendant and the plaintiff entered into an agreement whereby the plaintiff Indians agreed to accept allotments of their Executive order reservation lands in the amount of five acres of irrigable land per person and to relinquish the remainder of the reservation to the defendant. The petition further alleges that the 1893 Agreement was wholly nugatory, having been exacted without consideration, and under misrepresentation, duress and concealment of facts by the defendant; that the agreement presented to Congress was a forgery; and that the defendant further unilaterally and materially altered the 1893 Agreement by the Acts of August 15, 1894 (28 Stat. 286, 332), and April 21, 1904 (33 Stat. 189, 224), as amended by the Act of March 3, 1911 (36 Stat. 1058, 1063).

Pursuant to a Commission order of April 24, 1958, that certain causes of action in Docket No. 86 be stricken therefrom and included in Docket No. 320, the plaintiff's then attorney amended the petition in Docket No. 320 on June 24, 1958 to add a fifth cause of action premised on the 1893 Agreement being valid—alleging that it was ratified by the 1894 Act—and seeking damages for non-performance by the defendant. Plaintiff states that during the 1962 liability hearing the bulk of the evidence demonstrating the invalidity of the 1893

Agreement was not presented, and that during the oral argument plaintiff's former attorney abandoned the invalidity argument in favor or arguing for damages flowing from defendant's breaches of the 1893 Agreement.

Plaintiff now seeks to return to its original position, and contends that without a full presentation of evidence that the 1893 Agreement is invalid, plaintiff is left in the vulnerable position of having its assertions to the contrary sustained, resulting in the loss of its land "as the result of a wholly invalid agreement."

Plaintiff urges that this Commission declare the 1893 Agreement to be invalid and that plaintiff has retained title to its land. Plaintiff argues that authority for such action is contained in Section 2, Clause (3) of the Indian Claims Commission Act (25 U.S.C. §70a). We disagree. Section 2, Clause (3) of the Indian Claims Commission Act grants jurisdiction to the Commission to hear and determine "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity." The Commission and the courts have disclaimed jurisdiction over the validity of treaties between Indian tribes and the United States. In *Sac and Fox Tribe* v. *United States*[2] the Commission held that the validity of a properly executed treaty is not open for ordinary judicial inquiry under any law or statute, or as regards the Commission

[2] Docket No. 83, 7 Ind. Cl. Comm. 675, 710-712 (1959), *aff'd on other grounds*, 161 Ct. Cl. 189, 198, *cert. denied*, 375 U.S. 921 (1963).

under the Indian Claims Commission Act, that ratification imparts legality to a treaty, and that Congress alone has authority to abrogate or invalidate a treaty in whole or in part. The case is in line with earlier precedents. See *United States* v. *Minnesota*, 270 U.S. 181, 201 (1926); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567-568 (1903); *Fellows* v. *Blacksmith*, 19 How. 366, 372 (1856). The rationale applies equally to the ratified 1893 Agreement. It follows that the Commission is without authority to determine that the 1893 Agreement is invalid, and at most can determine monetary damages for fraud, duress, unconscionable consideration, etc. It is clear that under the circumstance the declaratory relief which the plaintiff seeks through presenting additional evidence of the invalidity of the 1893 Agreement cannot be achieve in this forum.[3] However, although it would thus be futile to allow the plaintiff to produce additional evidence for the purpose sought in its pending motion, it is possible that the evidence would have some bearing on the amount of monetary damages, if any, recoverable.

In seeking to reopen the record it is incumbent upon the plaintiff not only to set out the evidence that it seeks to introduce, in order that the Commission may judge the sufficiency thereof, but to demonstrate that the evidence is material to the issue, is not merely cumulative, and that it is reasonably probable that a different result will be reached if the evidence is admitted. *Combs* v. *Peters*, 23 Wis. 2d 629, 127 N.W. 2d 750, 754 (1964); *Re Eanelli's Estate*, 260 Wis. 192, 68 N.W. 2d 791, 802, 803 (1955); *Crouse* v. *McVickar*, 207

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[3] *See United States* v. *King*, 395 U.S. 1. (1969), *rev'g King* v. *United States*, 182 Ct. Cl. 831, 390 F.2d 894 (1968).

N.Y. 213, 100 N.E. 697, 698 (1912). The plaintiff has not yet met its burden in this respect, but will be given an opportunity to describe the evidence it seeks to introduce, and to show its materiality, if any, in respect to monetary damages.

The defendant argues that the provisions of 25 U.S.C. § 70v, as amended on April 10, 1967, by §70v-1, specifying that the Commission calendar all claims for trial prior to December 31, 1970, leaves the Commission without jurisdiction to hear any case not calendared prior to that date. The contention is without merit. The Commission has fully complied with 25 U.S.C. §70v, as amended. It is within the discretion of the Commission to reopen the record of pending cases as warranted by the facts, in order that the purposes of the Indian Claims Commission Act, in equitably settling cases, not be thwarted.

The defendant further argues that the plaintiff's motion should be denied because the plaintiff has had ample opportunity to present all relevant evidence, and the parties' proposed findings explore in depth the circumstances surrounding the execution of the 1893 Agreement. Because of the peculiar circumstances of this case, including the alleged differences of language and culture between the parties allegedly resulting in lack of communication and understanding, and due to the death and replacement of plaintiff's counsel, it is our

opinion that the plaintiff should be offered an opportunity to present fully its case. An appropriate order will be issued.

Concurring: \s\ JEROME K. KUYKENDALL
JEROME K. KUYKENDALL,
Chairman

\s\ JOHN T. VANCE
JOHN T. VANCE, Commissioner

\s\ RICHARD W. YARBOROUGH
RICHARD W. YARBOROUGH, Commissioner

\s\ MARGARET H. PIERCE
MARGARET H. PIERCE, Commissioner

\s\ BRANTLEY BLUE
BRANTLEY BLUE, Commissioner

APPENDIX E

UNITED STATES CLAIMS COURT
TRIAL DIVISION

Docket No. 320

QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JOINT MEMORANDUM RE STIPULATIONS

PART I

The parties stipulate to the following facts:

1. Plaintiff (hereinafter "Quechan" or "Quechan Tribe") is a duly recognized Indian tribe functioning under the Indian Reorganization Act of 1934.

2. By executive order of President Chester A. Arthur on January 9, 1884, a tract of land in the State of California "beginning at a point in the middle of the channel of the Colorado River due east of the meander corner to sections 19 and 30, township 15 south, range 24 east, San Bernardino meridian; thence west on the line between sections 19 and 30 to the range line between townships 23 and 24 east; thence continuing west on the section line to a point which when surveyed, will be the corner to sections 22, 23, 26, and 27, in township 15 south, range 21 east; thence south on the line

between sections 26 and 27, in township 15 south, range 21 east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections 34 and 35, in township 16 south, range 21 east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning," was set apart as a reservation for the Quechan. Tracts within the reservation to which valid rights had previously attached were excluded from the reservation.

3. There was excluded from the foregoing description so much of the land as was embraced within the Fort Yuma Military Reservation, but that reservation was by the same order transferred to the control of the Department of the Interior to be used for Indian purposes in connection with the reservation. Thereafter at all times the Fort Yuma Military Reservation, both in California and Arizona, was and is a part of the Quechan Reservation.

4. According to the order of the Secretary of the Interior, dated December 20, 1978, and by Supplemental Determination and Directives of the Secretary of the Interior, dated January 30, 1981, the 1884 executive order boundary of the Fort Yuma Indian Reservation, as modified by the executive order of December 19, 1900, which revoked the portion of the reservation lying south of the Colorado River in the then territory of Arizona, still remains the reservation boundary.

5. According to the secretarial order the exterior boundaries of the Quechan Reservation today are the boundaries set forth in paragraph 1, established by the

1884 executive order, as modified by the executive order of December 19, 1900, and those lands which have accreted to the 1884 boundaries.

6. The secretarial order of December 20, 1978, has attached to it a map entitled "Fort Yuma Indian Reservation 1884-1974, Revised September 1974 SDT," depicting the general location of the reservation boundary. The order provides that the exact location of the boundary "shall be determined hereafter by survey in accordance with the boundaries recognized by this Order." The parties have been unable to locate a map setting forth the exact location of the boundary by survey pursuant to the 1978 order, but both parties will continue to search for that map. In the event that a more accurate map cannot be located, the parties will stipulate to the highway system map prepared by the Fort Yuma Indian Agency, California, as setting forth the 1884 boundaries and the accreted lands.

7. The reservation as established in 1884 consisted of 48,608 acres. As a result of subsequent changes in the channel of the Colorado River, approximately 5,000 acres were added to the reservation by accretion. After the 1893 agreement, the reservation was thought to comprise approximately 8,100 acres.

8. If the December 20, 1978, secretarial order is upheld, there are no remaining issues as to the liability of the United States for the acquisition of portions of the Quechan Reservation. The issues remaining in the case relate to the determination of the damages sustained by the Quechan.

9. If the December 20, 1978, secretarial order is upheld, the proper measure of damages for the portions

of the reservation which were permanently acquired from the Quechan is the fair market value of those portions of the reservation on the effective dates of the permanent acquisitions. No stipulation is entered into as to the measure of damages for the temporary deprivation of those lands which were reaffirmed by the executive order of December 20, 1978, or of those lands which, after a period of temporary deprivation, were permanently acquired.

10. The secretarial order of December 20, 1978, excluded from the recognition of the trust status of the lands within the 1884 exterior boundaries those lands as to which valid rights were acquired by third parties before or after 1884 and reclamation work projects constructed on the reservation pursuant to statutes after 1884. Those exceptions are described in detail in the secretarial Determination and Directives signed by Secretary Watt on January 30, 1981, and published in 46 Federal Register at page 11,372, et seq.

11. Both the United States and the Quechan Tribe were and are parties to the case of *Arizona v. California*, No. 8 Original, and participated in hearings before Elbert P. Tuttle, Special Master, appointed by the Supreme Court, in 1980 and 1981. The parties waive foundation for the introduction into evidence in this case of any portions of the transcript of the hearings before Special Master Tuttle and any exhibits which were introduced into evidence at the hearings before Special Master Tuttle, reserving their objections as to relevancy and materiality.

12. Plaintiff has furnished to defendant's attorney and defendant has furnished to plaintiff's attorney a copy of the exhibits relied upon and cited by the plaintiff's witness, Robert G. Hill, and defendant's witnesses, John T. Daubert and James G. Sawyers. Both parties waive foundations for the introduction into evidence of all those exhibits relied upon and cited by the named witnesses. Both parties reserve all objections as to relevancy and materiality.

13. All of the lands of the Quechan Reservation which lie below the All American Canal (the southern lands) were and are practicably irrigable, and for the purpose of determining damages in this action they shall be valued as irrigated lands.

PART II

14. In addition to the foregoing stipulations, the Quechan Tribe offers to stipulate that of the approximately 25,000 acres of reservation land lying north and west of the All American Canal (the northern lands), 6,199 acres were found to be practicably irrigable by Special Master Tuttle, and for the purpose of these hearings those 6,199 acres were and are practicably irrigable and shall be valued for damages as irrigated lands.

The United States refuses to stipulate as to these 6,199 acres of northern lands because the evidence appears to establish that the land could not be profitably irrigated.

15. The Quechan Tribe also offers to stipulate that as a result of the December 20, 1978, secretarial order there are no remaining issues as to the liability of the United States for the taking of portions of the Quechan Reservation. The issues remaining in the case relate to

the determination of the damages sustained by the Quechan.

The United States is unable to so stipulate because of the Supreme Court opinion in *Arizona v. California* that there must be a judicial determination of the Quechan boundary.

16. The Quechan Tribe also offers to stipulate that the proper measure of damages for the portions of the reservation which were permanently taken from the Quechan is the fair market value of those portions of the reservation on the effective dates of the permanent acquisitions. The measure of damages for the temporary deprivation of those lands which were reaffirmed by the executive order of December 20, 1978, and of those lands which, after a period of temporary deprivation, were permanently acquired, is their fair rental value.

The United States is unable to so stipulate for the reason set forth in paragraph 15 and also because, in any event, the United States contends that the measure of damages for a temporary deprivation is the rents actually received by the United States.

DATED: May 26, 1983,

Respectfully submitted,

RAYMOND C. SIMPSON and
KILPATRICK, CLAYTON, MEYER
& MADDEN, a professional corporation

By: \s\ B.J. KILPATRICK
B.J. KILPATRICK
Attorneys for plaintiff

CAROL E. DINKINS
ASSISTANT ATTORNEY GENERAL
RICHARD L. BEAL, ATTORNEY
Attorneys for the defendant

By: \s\ RICHARD L. BEAL
Attorney

APPENDIX F

IN THE UNITED STATES CLAIMS COURT

Docket No. 320

QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 5, 1983]

STIPULATION FOR SETTLEMENT AND ENTRY OF FINAL JUDGMENT

The parties, by counsel, hereby stipulate that the above-entitled claim should be settled, compromised, and finally disposed of by entry of final judgment as follows:

1. There shall be entered in the action a net judgment, without offsets, for plaintiff in the amount of Fifteen Million Dollars ($15,000,000.00). Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claim encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or

offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

2. The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case.

3. The final judgment of the United States Claims Court, pursuant to this stipulation, shall constitute a final determination by the court of the above-captioned case and shall become final on the day it is entered, all parties hereto waiving any and all rights to appeal from or otherwise seek review of such final determination.

4. Attached to this stipulation and incorporated by reference are: a resolution approving the settlement adopted by the Quechan Tribal Council, plaintiff's governing body, on June 16, 1983; a resolution adopted at a meeting of the adult members of the Quechan Tribe of Indians held at Yuma, Arizona, on July 8, 1983, and a further resolution ratifying the action of the members and reaffirming the approval of the settlement by the Quechan Tribal Council adopted July 8, 1983; all of said resolutions authorizing counsel for plaintiff to enter into this stipulation, as set forth herein; and a copy of the letter approving the settlement of this litigation by the

Department of the Interior or its authorized representative. (Exhibits 1-4).

DATED: July 12, 1983.

RAYMOND C. SIMPSON and
KILPATRICK, CLAYTON, MEYER
& MADDEN

By: \s\ RAYMOND C. SIMPSON
RAYMOND C. SIMPSON
Attorneys of Record for
Plaintiff

DATED: July 29, 1983.

F. HENRY HABICHT, II
RICHARD L. BEAL

By: \s\ RICHARD L. BEAL
RICHARD L. BEAL
Attorney for Defendant

EXHIBIT 1

[seal omitted]

QUECHAN INDIAN TRIBE
Fort Yuma Indian Reservation

P.O. Box 1352
YUMA, ARIZONA 85364
Phone (619) 572-0213

RESOLUTION

R-33-83

A Resolution of the Quechan Tribe authorizing Attorney Raymond C. Simpson to finalize a settlement of Quechan vs. United States Docket #320.

WHEREAS: The Quechan Tribal Council acknowledges an offer by the U.S. Attorney to settle Docket #320, and

WHEREAS: The Quechan Tribal Council realizes that the U.S. Attorney's first offer of $13,500,000.00 was not in the best interest of the tribe, and

WHEREAS: The Quechan Tribal Council has determined that the U.S. Attorney's final offer of $15,000,000.00 is a fair and reasonable amount for settlement, and

WHEREAS: The Quechan Tribal Council realizes that a previous action through Council Resolution R-24-83 authorized Attorney Raymond C. Simpson to negotiate settlement between $15,000,000.00 to $20,000,000.00.

SO THEREFORE BE IT RESOLVED: That the Quechan Tribal Council does hereby rescind Resolution R-24-83 and authorize final settlement of Docket #320 in the amount of $15,000,000.00, and

BE IT FINALLY RESOLVED: That the Quechan Tribal Council authorizes Attorney Raymond C. Simpson to finalize said settlement on behalf on the Quechan Tribe.

CERTIFICATION

The foregoing resolution was presented at a Regular Council meeting which convened on June 16, 1983, duly approved by a vote of 5 for, and 0 against, by the Tribal Council of the QUECHAN INDIAN TRIBE, pursuant to authority vested in it by Section 16 of the Indian Reorganization Act of June 15, 1934 (49 Stat. 378), and Article IV, Section 1(b), Section 15, and Article VIII, Section 1, of the Quechan Tribe Constitution and Bylaws. This resolution is effective as of the date of its approval.

QUECHAN INDIAN TRIBE

By:

/s/ VINCENT HARVIER
VINCENT HARVIER, President

/s/ PATRICIA E. QUAHLUPE
PATRICIA E. QUAHLUPE,
Secretary

APPROVED:

_____
Superintendent

Exhibit 2

[seal omitted]

QUECHAN INDIAN TRIBE
Fort Yuma Indian Reservation

P.O. Box 1352
YUMA, ARIZONA 85364
Phone (619) 572-0213

RESOLUTION

R-34-83

WHEREAS: The Quechan Tribe of Indians has been prosecuting a claim before the United States Claims Court entitled Quechan Tribe of Indians v. United States of America, Docket 320, and

WHEREAS: The above-entitled action was set for trial before the United States Claims Court on June 20, 1983, in San Diego, California, and

WHEREAS: A pre-trial in the action was held in Washington, D.C., on June 8, 1983, at which, among other things, the status of settlement negotiations was discussed, and

WHEREAS: With the approval of the Quechan Tribal Council settlement negotiations had been conducted for several months prior to June 8, 1983, between the attorneys for the Tribe and the attorneys representing the United States, and

WHEREAS: On April 20, 1983, the Quechan Tribal Council adopted resolution R-24-83 authorizing a settlement of the action for not less than Fifteen Million Dollars ($15,000,000.00), and

WHEREAS: On June 15, 1983, the attorneys forthe Quechan Tribe and the attorneys representing the United States agreed to a settlement of the claims in Docket 320 for a net amount of $15,000,000.00, and

WHEREAS: The Tribal Council of the Quechan Tribe of Indians fully debated and considered the proposed offer of settlement and approved the settlement by resolution adopted June 16, 1983, and

WHEREAS: Considerable time will be taken to hear and determine the issues in the case if litigated and appealed, and there will be considerable additional expense and further delays before a final judgment could be entered, and

WHEREAS: The Quechan Tribe of Indians held a general membership meeting of the Tribe on July 8, 1983, for the purpose of considering the terms of such settlement, and Raymond C. Simpson, Attorney, appeared before the general membership meeting and fully explained and evaluated the proposed compromise and settlement and answered questions of members of the Tribe, and,

in addition, members of the Tribal Council explained the settlement, and

WHEREAS: Representatives of the Department of Interior, Bureau of Indian Affairs, were present during the meeting and observed proceedings, and

WHEREAS: The adult members of the Quechan Tribe of Indians are fully informed and advised about the proposed settlement.

NOW, THEREFORE, BE IT RESOLVED, by the adult members of the Quechan Tribe of Indians assembled that the proposed settlement of the claims of the Tribe in Docket 320 for the net sum of $15,000,000.00, without offsets, be and hereby is approved, it being understood that this approval authorizes the attorneys to execute the proposed stipulation for entry of final judgment, and

BE IT FURTHER RESOLVED, that the President and Secretary of this meeting are authorized to execute the proposed stipulation and that the members of the Tribal Council are authorized to appear and testify before the United States Claim Court about the proposed settlement and the action taken by the adult members of the Quechan Tribe of Indians, and

BE IT FURTHER RESOLVED, that the Secretary of the Interior and the United States Claims Court are hereby requested to approve the proposed settlement and stipulation for entry of final judgment.

/s/ VINCENT HARVIER
VINCENT HARVIER,
President

ATTEST:

/s/ PATRICIA QUAHLUPE
PATRICIA QUAHLUPE
Secretary

CERTIFICATION

I hereby certify that at a duly called meeting of the adult members of the Quechan Tribe of Indians held July 8, 1983, notice of which was mailed to each member of the Tribe and published, the foregoing resolution was adopted by a vote of 53 for a 2 opposed, with 4 abstentions.

DATED: July 8, 1983.

/s/ VINCENT HARVIER
VINCENT HARVIER
President

ATTEST:

/s/ PATRICIA QUAHLUPE
PATRICIA QUAHLUPE
Secretary

I hereby certify that VINCENT HARVIER and PATRICIA QUAHLUPE, personally known to me, subscribed their names to the foregoing resolution in my presence and that the resolution was adopted by a vote of 53 for and 2 opposed and 4 abstained.

DATED: July 8, 1983.

/s/ signature illegible
Supt.
Representative, Bureau of Indian
Affairs, U.S. Department of the Interior

Exhibit 3

QUECHAN TRIBE OF INDIANS

RESOLUTION OF THE TRIBAL COUNCIL

RESOLUTION NO. R-35-83

WHEREAS, on June 16, 1983, the Quechan Tribal Council authorized attorneys for the Tribe to propose to the Attorney General of the United States that the Tribe accept the sum of Fifteen Million Dollars ($15,000,000.00) without offsets in full settlement of the claims of the Tribe, in Docket 320 before the United States Claims Court, subject to tribal approval and to the customary conditions of the United States for settlement of claim cases, and

WHEREAS, on July 8, 1983, the Attorney General of the United States approved the settlement under customary conditions, and

WHEREAS, on July 8, 1983, the Quechan Tribe of Indians had a general membership meeting pursuant to proper notice, for the purpose of considering and voting on the terms of the settlement, which was fully discussed by the members of the Tribe and by the attorneys representing the Tribe before the United States Claims Court, and

WHEREAS, the adult members of the Quechan Tribe of Indians were fully informed and advised about the proposed settlement and were fully advised as to the proposed stipulation for entry of final judgment, and

WHEREAS, the adult members of the Quechan Tribe of Indian adopted a resolution approving the compromise and settlement by a vote of 53 for and 2 opposed, with 4 abstentions, and

NOW, THEREFORE, BE IT RESOLVED by the Tribal Council of the Quechan Tribe of Indians that the proposed compromise and settlement of the claims of the Tribe in Docket 320 by and hereby is affirmed, approved, and ratified and the proposed stipulation for final entry of judgment by and hereby is approved.

BE IT FURTHER RESOLVED: The following individuals be and hereby are authorized to testify before the United States Claims Court regarding the proposed settlement and the action taken by the adult members of the Quechan Tribe of Indians:

Vincent Harvier, President

Vernon Smith, Vice President

Joe Jackson

George Bryant

John Norton

BE IT FURTHER RESOLVED That the attorneys for the Tribe are authorized to execute the proposed stipulation for entry of final judgment and to take whatever steps are necessary to effectuate the compromise and settlement.

/s/ VINCENT HARVIER
VINCENT HARVIER,
President

ATTEST:

/s/ PATRICIA QUAHLUPE
PATRICIA QUAHLUPE
Secretary

The foregoing resolution was adopted by the Tribal Council of the Quechan Tribe of Indians on the 8th day of July, 1983, by a vote of 4 for and none opposed at a duly called meeting at which a quorum of the Tribal Council members were present.

/s/ VINCENT HARVIER
VINCENT HARVIER,
President

ATTEST:

/s/ PATRICIA QUAHLUPE
PATRICIA QUAHLUPE
Secretary

Exhibit 4

[seal omitted]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Tribal Government Services (AD)

[Filed: JULY 27 1983]

Raymond C. Simpson, Esquire
2032 Via Visalia
Palos Verdes Estates, California 90274

Dear Mr. Simpson:

By letter dated July 11 you requested consideration and approval of a proposal compromise to settle the claims of the Quechan Tribe of Indians in Docket No. 320 for a net final judgment of $15,000,000. This case involves claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978.

The claims in Docket No. 320 are being prosecuted by you under contract No. H50C14207367. This contract was made on February 10, 1971, and duly approved by the Phoenix Area Director. The term of the contract is effective through April 10, 1985.

Pursuant to authority granted to you by the Quechan Tribal Council, you submitted a letter to the Department of Justice offering to settle the claims in Docket No. 320 for $15,000,000. Your offer was accepted by the Acting Assistant Attorney General by letter dated July

8, 1983, with conditions. Among the conditions were that the proposed settlement be approved by appropriate resolutions of the governing body and the general membership of the tribe. In addition, approval of the settlement as well as the resolutions of the tribe must be secured from the Secretary of the Interior or his authorized representative.

Entry of judgment in this case shall finally dispose of all claims which the tribe has asserted or which the tribe could have asserted against the defendant under the Indian Claims Commission Act in Docket No. 320.

For purposes of obtaining consideration and approval of the settlement from the general membership of the tribe, a claims settlement meeting was scheduled and held on July 8, 1983, at the Quechan Tribal Office. Prior to the meeting, notices were posted throughout the reservation and mailed to the tribal members.

QUECHAN GENERAL MEMBERSHIP MEETING

On July 8, 1983, the general membership claims settlement meeting was convened at 2:15 p.m. by Vincent Harvier, President, Quechan Tribal Council. Approximately 70 people were in attendance. President Harvier explained to the tribal members the extensive involvement the tribal council has had in the settlement negotiations and his observations of what transpired at a hearing on these claims held the previous month before the United States Claims Court. After some discussion and comments by the tribal council members, you were asked to give your presentation. You gave a thorough and concise description of the history of the claims and explained the terms of the proposed settlement. Afterwards, Mr. George

Bryant, a tribal member, translated the written summary of your explanation into the Quechan language. Those present were then given an opportunity to comment on and ask any questions they may have concerning the settlement. The Bureau observers report that those present at the meeting appeared to understand the nature of the claims and the terms of the proposed settlement.

After some discussion of the settlement, President Harvier read the proposed general membership resolution accepting the terms of the settlement. A motion was made and seconded to adopt the resolution. Quechen General Membership Resolution No. R-34-83 was adopted by a vote of 53 for and 2 opposed, with 4 abstentions.

We are satisfied that appropriate steps were taken to publicize the Quechan general meeting held on July 8, 1983, so as to afford the tribal members an opportunity to attend the meeting and to consider and vote on the proposed settlement. The general meeting was properly conducted and the votes of the tribal members were fairly taken and reflected the views of the persons who voted. Quechan General Membership Resolution No. R-34-83 is hereby approved.

QUECHAN TRIBAL COUNCIL MEETING

After the general membership meeting, a duly called tribal council meeting was held for the purpose of considering and voting on the proposed settlement. A quorum of the council was present. The Quechan Tribal Council adopted Resolution No. R-35-83 approving the proposed settlement by a vote of 4 for and none opposed.

The Quechan Tribe is organized under a constitution and bylaws adopted pursuant to the Indian Reorganization Act. The constitution provides that the Quechan Tribal Council shall represent the Quechan Tribe in all affairs and shall have the power to present and prosecute any claims or demands of the tribe.

Resolution No. R-35-83, enacted on July 8, 1983, by the Quechan Tribal Council constitutes the action of the governing body of the tribe and is hereby approved.

The information furnished to us by you, our field officers, and information from other sources has satisfied us that the proposed settlement of the claims in Docket No. 320 is fair and just. The proposed settlement is hereby approved.

Sincerely,

/s/ signature illegible

Acting Deputy Assistant Secretary -
Indian Affairs (Operations)

APPENDIX G

IN THE UNITED STATES CLAIMS COURT

TRIAL DIVISION

DOCKET 320

QUECHAN TRIBE OF THE
FORT YUMA RESERVATION, CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JOINT MOTION FOR APPROVAL OF SETTLEMENT AND ENTRY OF FINAL JUDGMENT

The parties, by counsel, hereby jointly move the court for an order approving a compromise and settlement of the above-entitled action and entering a final judgment in the sum of $15 million. The terms of the settlement are set forth in a stipulation entered into by the parties, which is filed herewith and which sets forth the terms of the settlement as follows:

1. There shall be entered in the action a net judgment, without offsets, for plaintiff in the amount of $15 million. Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in docket 320, and plaintiff shall be barred thereby from

asserting any further rights, claims, or demands against the defendant and future action on the claims encompassed in docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in docket 320, and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

2. The final judgment shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purpose of precedent or argument in any other case.

3. The final judgment shall constitute a final determination of the action, to become final on the date it is entered, all parties waiving any and all rights to appeal from or otherwise seek review of the judgment.

4. Attached to the stipulation and incorporated herein by reference are: a resolution approving the settlement adopted by the Quechan Tribal Council, plaintiff's governing body, on June 16, 1983; a resolution adopted at a meeting of the adult members of the Quechan Tribe of Indians held at Yuma, Arizona, on July 8, 1983; and a further resolution ratifying the action of the members and reaffirming the approval of the settlement by the Quechan Tribal Council adopted July 8, 1983; all of said resolutions authorizing counsel for plaintiff to enter into the stipulation, and a copy of the letter approving the settlement of the litigation by the Department of the Interior or its authorized representative.

DATED: July 27, 1983.

RAYMOND C. SIMPSON and
KILPATRICK, CLAYTON, MEYER
& MADDEN, a profession corporation

By: \s\ RAYMOND C. SIMPSON
RAYMOND C. SIMPSON
Attorneys for plaintiff

F. HENRY HABICHT II
Assistant Attorney General
RICHARD L. BEAL, Attorney

By: \s\ RICHARD L. BEAL
RICHARD L. BEAL
Attorneys for defendant

By: F. HENRY HABICHT, II
Acting Assistant Attorney General
Land and Nautrual Resources Division

APPENDIX H

IN THE UNITED STATES CLAIMS COURT

TRIAL DIVISION

DOCKET 320

QUECHAN TRIBE OF THE
FORT YUMA RESERVATION, CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINAL JUDGMENT

A joint motion having been filed herein by the parties for approval of compromise settlement and entry of final judgment, pursuant to a written stipulation therefor filed with the motion, the court, being fully advised, concludes as a matter of law that the proposed settlement of plaintiff's claim is equitable and just to both parties and that final judgment should be entered in accordance with the stipulation. The court, therefore, approves that stipulation and renders judgment as follows:

Judgment is rendered for plaintiff in the amount of $15 million.

Entry of this final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted

or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

This final judgment is based on a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case.

This final judgment is a final determination by the court of the above-captioned case and shall become final on the date it is entered, all parties having waived in open court any and all rights to appeal from or otherwise seek review hereof.

DATED: August 11, 1983.

ALEX KOZINSKI

Chief Judge

13

Supreme Court, U.S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, *et al.*

EXCEPTION OF THE QUECHAN INDIAN TRIBE TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER AND SUPPORTING MEMORANDUM

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68 pp

The Quechan Indian Tribe respectfully excepts to the Report and Recommendation (dated July 28, 1999) of Special Master Frank J. McGarr, as follows:

The Report and Recommendation erroneously concludes that collateral estoppel precludes the United States and the Quechan Tribe from seeking an adjudication of the boundaries and attendant water rights of lands identified as part of the Tribe's reservation by secretarial order.

MASON D. MORISSET, Counsel of Record
K. ALLISON MCGAW

December 20, 1999

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MEMORANDUM FOR THE QUECHAN INDIAN TRIBE IN SUPPORT OF ITS EXCEPTION TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

1 INTRODUCTION

This is an original-jurisdiction case adjudicating water rights primarily among sovereigns.[1] On July 28, 1999, Special Master Frank McGarr concluded, without citation to authority, that the Quechan Tribe of Indians (Tribe) and the United States are summarily precluded from seeking a final determination[2] of the boundaries of the Tribe's Reservation, including water rights attached to lands identified as being within the Tribe's

1. "The Judicial Power shall extend . . . to Controversies between two or more States. . . . In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2. *See also* 28 U.S.C. § 1251(a).

2. "Final determination" are words of art in the context of this original action. The Court's 1979 supplemental decree in *Arizona v. California* specified that the quantities of water allocated to the Fort Yuma Reservation would continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundary of the Fort Yuma Reservation is finally determined. 439 U.S. at 421.

In *Arizona v. California*, 460 U.S. 605, 636 (1983), the Court ruled that a decision of the Secretary of the Interior in 1978 did not constitute a final determination of the Fort Yuma Reservation boundary as envisioned by the 1979 supplemental decree. Then, on October 10, 1989, the Court issued the following order designed to effect a final determination of the long-disputed Reservation boundary: "The motion of the state parties to reopen the decree to determine disputed boundary claims with respect to the Fort Majave [sic], Colorado River and Fort Yuma Indian Reservations is granted. Justice Marshall took no part in the consideration of this motion." *Arizona v. California*, 493 U.S. 886 (1989).

reservation by secretarial order.[3] The Special Master based his conclusion on a stipulation between the United States and the Tribe made in a case before the Court of Claims.[4] Report and Recommendation at 6; *see also* Order No. 4 (Sept. 6, 1991).[5] His conclusion denies the Tribe substantial land and water reserved to them by the United States, and it does so in a summary fashion, without the chance for the Tribe to present its case. The Special Master's conclusion violates well settled precedent requiring that an issue be necessarily decided by a court before it is granted preclusive effect, especially in actions, such as this one, by third parties.

2 STATEMENT

A brief background of the Quechan people and the Fort Yuma Reservation is helpful to understanding the issues involved here.[6] The present-day Quechan Tribe is the successor-in-interest to the historic Yuma or Quechan people. The historical Indian name is "Kwatca'n," or Quechan; the name "Yuma" is

3. This phase of this long running case is usually referred to as *Arizona III*. *Arizona III* involves disputed boundary claims relating to three Indian reservations: Fort Mojave, Colorado River and Fort Yuma (Quechan). The Fort Mojave and Colorado River reservation disputes have been settled by stipulation and agreement of the respective parties. *See* Appendices 3 and 4 to report of Special Master McGarr (July 28, 1999).

4. *See* footnote 15, *infra*.

5. Motions for reconsideration were denied by Orders No. 5 (Jan. 20, 1992); No. 7 (May 15, 1992); No. 13 (Apr. 13, 1993).

6. This litigation began in 1952 when the State of Arizona invoked the original jurisdiction of this Court by filing a complaint against the State of California and several of its public agencies. Nevada, New Mexico and Utah intervened or were joined later. The United States intervened on behalf of federal establishments, including five Indian tribes. 344 U.S. 919 (1953). The subsequent procedural history, which has resulted in multiple reported and unreported decisions, is summarized in Special Master McGarr's Report and Recommendation. A detailed discussion of the Quechan Tribe's boundary land claims is contained in the February 22, 1982, Report of Special Master Tuttle at 62, 239-254.

the English equivalent. *Quechan Tribe of the Fort Yuma Reservation v. United States*, 8 Ind. Cl. Comm. 111, 116 (1959). The Quechan people were first identified by Euroamericans in 1700 by Father Kino, a Jesuit priest and explorer. He noted that they inhabited areas in the Gila River Valley and at the confluence of the Gila and Colorado Rivers. This area has been the center of their territory ever since, and is where they now have a reservation. Other Jesuit priests noted the presence of Quechan Indians in this area during additional visits in the 1700's, and the Quechan Indians figure prominently in the diaries of these journeys concerning fording the Colorado River and establishment of missions near what is now known as Pilot Knob. Anthropological evidence establishes that the Quechan Indians of the Fort Yuma Reservation have been identified from aboriginal times. *Id.* at 117.

Although the United States acquired sovereignty over the land occupied by the Quechan Indians by the Treaty of Guadalupe Hidalgo in 1848, the Quechan's right of occupancy continued after the sovereignty of the United States and the Indian right of occupancy became legally recognizable under the long-established Indian policy of the United States. 8 Ind. Cl. Comm. at 118; *see also United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 346 (1941).

Following increased pressure on the aboriginal way of life by the influx of Euroamericans into the territory, Congress established the Colorado River Reservation in 1865. Act of March 3, 1865 (13 Stat. 559). The Quechan Indians refused to move to that reservation, as it was remote from their aboriginal lands. As increased settlement and trade took place, the United States finally established the Fort Yuma Reservation on January 9, 1884, for the Quechan at the current site. Executive Order, President Chester A. Arthur (Jan. 9, 1884). 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* at 832 (1904). The reservation is located straddling the Colorado River in Southwestern Arizona and Southeastern California. *See* Locator Maps 1 and 2, Appendices D and E hereto.

The present-day Quechan Tribe of the Fort Yuma Reservation is a federally recognized tribe of American Indians with a constitution and bylaws duly adopted by the Tribe and originally approved by the Secretary of Interior on December 18, 1936, pursuant to the Indian Reorganization Act. Act of June 18, 1934 (25 U.S.C. §§ 476-494). The present-day Tribe has been determined the successor to the rights of the historical Yuma or Quechan tribe. 8 Ind. Cl. Comm. 111, 143 (1959).

As the present-day legal entity that is successor to the aboriginal Quechan Indians, the Quechan Tribe possesses both proprietary and governmental powers within the Fort Yuma Reservation. Pursuant to this authority, the tribal government, which consists of an elected council and president, is responsible for the health and welfare of its people and for the maintenance and development of the Reservation as a homeland for the Quechan people. Obviously, due to the desert climate, water is essential to the continued well-being of the Quechan people and to their economic self-sufficiency and commercial development.

From the time of their first contact with Euroamericans, the Quechans, like other tribes along the lower Colorado and Gila Rivers, practiced agriculture and raised crops of corn, beans, pumpkin, and melons. Anthropologists have estimated that the Quechan Indians obtained at least half of their food from agriculture. 8 Ind. Cl. Comm. at 119.

Today the Quechan Tribe continues to use water for agricultural purposes on the Reservation, producing crops that are commercially marketed. In addition, water is used for governmental and proprietary purposes, including domestic use and business activities. This case fundamentally affects the Tribe's rights to portions of its original Reservation and attendant water rights.

2.1 *The 1893 Agreement for Allotment and Irrigation of the Fort Yuma Reservation.*

In 1893, the Quechan Indians and the Commissioner of Indian Affairs negotiated an Agreement (the 1893 Agreement) to provide for the building of an irrigation canal along a right-of-way on the Reservation, which had been authorized earlier.[7] The 1893 Agreement was ratified by Congress by the Act of August 15, 1894, 28 Stat. 286, 332.

The 1893 Agreement provided for the cession of approximately 25,000 acres of lands of the Fort Yuma Reservation.

> The said Yuma Indians, *upon the conditions hereinafter expressed,* do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of county in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows . . .

Appendix C, art. I (emphasis added). As noted, the cession was expressly conditioned upon performance by the United States and the canal company of certain conditions.

The numerous specific provisions to be met before the cession was effective included: (a) construction of a canal within three years, (b) allotment of irrigated lands to tribal members, (c) sale of certain lands to raise revenues to assist in the construction of the canal, and (d) opening of certain lands to the public domain. A provision for delivery of one acre-foot of free water to each Indian male adult over a ten-year period for crop irrigation was added by the ratifying legislation (*see* "1893 Agreement and Approving Statute, 28 Stat. 332," set forth in Appendix C hereto).

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7. The Act of February 15, 1893, 27 Stat. 420, permitted an irrigation company a right-of-way across the Fort Yuma Indian Reservation for the purpose of constructing a canal.

These conditions were never performed. The canal was never constructed. In 1898 the United States evicted the canal company from the Reservation because of its failure to comply with the 1893 Agreement.[8] Portions of the irrigable lands were never identified for sale to non-Indians and, as a result, the Quechan Indians never received revenue from the sale. They did not receive allotments or free water for ten years. The lands not irrigated were never opened to public settlement. Opinion of the Solicitor, 86 I.D. 1 (1978). Thus the Agreement and the statute approving it were not complied with. Subsequent events served to complicate the status of the lands involved in the 1893 Agreement.

2.2 *Subsequent Events Concerning Reservation Land.*

Later, early in the twentieth century, an irrigation system was placed on portions of the Fort Yuma Reservation. That system, a part of the Yuma Project, was authorized by the Indian Appropriation Act of 1904, 32 Stat. 388 (as amended 43 U.S.C. §§ 371, *et seq.*) and 33 Stat. 189, 224.[9] Pursuant to the 1904 Act, approximately 6,500 acres of the lands on the Fort Yuma Reservation located adjacent to the Colorado River and the diversion canal were sold to non-Indians and water was promptly delivered to that non-Indian unit (known as the Bard unit) in March 1910.[10] By 1915, a distribution system to the Indian allotments on the Fort Yuma Reservation, located to the west of the non-Indian Bard unit and dependent upon the facilities of the Bard unit, was under construction. By 1917, two thousand acres of Indian lands were

8. Letter, Commissioner of Indian Affairs W.A. Jones to Secretary of the Interior Hitchcock (July 2, 1902).

9. The Reclamation Law of 1902, 32 Stat. 388 (as amended 43 U.S.C. §§ 371 *et seq.*), authorized federal monies to irrigate public lands. A separate authorization was required for the irrigation of Indian lands and that separate authorization was obtained for both the Fort Yuma Reservation and the Colorado River Reservation in 1904.

10. United States Reclamation Service, *Ninth Annual Report* (1909-1910) at 78.

being irrigated.[11] An additional five thousand acres of Indian lands were subsequently irrigated. The provisions of the 1904 Act bore little resemblance to the terms of the 1893 Agreement and enabling statute. Nevertheless, the 1904 Act allowed some reservation lands to be removed from tribal ownership.

The second major development was the construction of the All-American Canal. The Canal originated in the late 1920's as a private undertaking of the Imperial Irrigation District of California. Over the years, the Bureau of Indian Affairs and the Bureau of Reclamation reviewed different proposed locations for the canal. The Bureau of Indian Affairs requested rights-of-way from the Quechan Indians to permit the construction of the All-American Canal across portions of the Fort Yuma Reservation.[12] In 1935, the Commissioner of Indian Affairs advised the Bureau of Reclamation that any right-of-way would have to comply with the terms of the recently enacted Indian Reorganization Act of June 18, 1934, 48 Stat. 984. This advice was consistent with the view that the conditions in the 1893 Agreement had not been met and, therefore, the lands in question were still held in trust for the Tribe.

The third development was the 1936 opinion of the Solicitor of the Department of the Interior, Nathan B. Margold. He opined that the All-American Canal lands had in fact been ceded to the United States under the 1893 Agreement.[13] This eliminated the requirement for a right-of-

11. Report on the Irrigation of Yuma Reservation Land to the Commissioner of Indian Affairs (March 9, 1918).

12. For example, General Land Office Commissioner Fred W. Johnson stated on July 5, 1934, to the Commission of Indian Affairs, "since the right-of-way involves Indian lands and is applied for under Sec. 13 of the Act of June 25, 1910, 36 Stat. 855, the administration of which Act is under the jurisdiction of the Office of Indian Affairs, I am forwarding the map showing the right-of-way for your consideration and appropriate administration."

13. *Yuma Reservation–Title to Lands*, I Ops. Sol. 596 (January 8, 1936).

way. Solicitor Margold concluded that while the express conditions stated in the 1893 Agreement had not occurred, the cession of the non-irrigable lands (required to construct the All-American Canal) nevertheless occurred in 1893, because the conditions in the 1893 Agreement were not "material." The opinion concluded that the non-irrigable lands immediately vested in the United States in 1893 and remained there, notwithstanding the failure of virtually every condition in the 1893 Agreement. This conclusion was completely inconsistent with treatment of the subject land as part of the Reservation.

This opinion was later reversed by the Department of the Interior in 1978, as will be explained below. Before it was reversed, the 1936 Solicitor's Opinion dramatically changed the administration of the boundary lands: it essentially transferred jurisdiction from the Bureau of Indian Affairs to the Bureau of Reclamation. The 1936 opinion operated to terminate a previously uninterrupted pattern of Bureau of Indian Affairs supervision over the non-irrigated lands. More importantly, however, the 1936 opinion gave the Bureau of Reclamation the green light to build the All-American Canal without the consent of the Quechan Indians.

The fourth relevant development was the filing of an action before the Indian Claims Commission[14] in 1951 that claimed compensation from the United States concerning the non-

14. In 1946 Congress established the Indian Claims Commission to hear all Indian claims accruing before 1946, including "claims in law or equity arising under the Constitution" and claims arising from the lack of "fair and honorable dealing" by the United States. Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §§ 70 *et seq.* (1976). The Commission heard claims brought by tribes for wrongful taking of lands, inadequate compensation for lands, damage to lands, etc. Congress subsequently transferred jurisdiction over these cases to the Court of Claims.

irrigable lands. Alleging alternative damage theories,[15] the Tribe initially contended that the United States took the Reservation lands in 1893 and did not adequately compensate the Tribe. Other claims contended that the United States, in negotiating and implementing the 1893 Agreement, violated the fair and honorable dealing standard established by the Indian Claims Commission Act. The Tribe's amended 1958 claim also asserted that the 1893 Agreement was never implemented, that beneficial title was still in the Tribe, and that trespass damages for unlawful use of the Reservation lands were therefore required.

The fifth development occurred on December 20, 1978, when Department of Interior Solicitor Leo Krulitz issued an opinion reversing previous Solicitors' opinions concerning the 1893 Agreement. He concluded that, because the Quechan Tribe had ceded its lands conditionally under the 1893 Agreement and those specific conditions were never met, the Tribe's relinquishment of title to the Tribe's non-irrigated lands never took effect. 86 I.D. 1 (1978). That same day, Secretary Andrus issued an order confirming that the boundaries of the Fort Yuma Reservation were consistent with the 1884 executive order creating the Reservation.[16]

2.3 *Subsequent Litigation in This Case.*

On December 21, 1978, the United States moved to modify the 1964 Decree in this case to obtain water for certain Indian "omitted" and "boundary" lands.[17] Though acknowledging that the 1964 Decree (Article II(D)(5)) only provided for subsequent

15. The Tribe filed an amended petition in 1958.

The only reported decision in Docket 320 with respect to the 1893 Agreement is published at 26 Ind. Cl. Comm. 15 (July 21, 1971). This decision also contains a description of the Tribe's alternative claims.

16. Secretarial Determination and Directives of December 20, 1978, *published at* 46 Fed. Reg. 11,372 (Jan. 30, 1981).

17. Motion of the United States for Modification of Decree and Supporting Memorandum 6 (Dec. 21, 1978). The United States sought water for "boundary lands" for which water had not been allocated in the original proceeding and for "omitted lands" that had not been considered to be practicably irrigable in the original proceeding.

adjustment as a result of final boundary determinations on the Colorado River and Fort Mojave Reservations, the United States argued that "fundamental equitable principles require that the same rule apply to the other reservations whose boundaries likewise have been finally determined to include acreage not known to be encompassed in 1964" and that this principle "appears to be agreed on all sides and is, indeed expressly contemplated by the supplemental decree proposed by the state parties."[18] Consequently, the United States sought to increase the Fort Yuma Reservation's allocation to provide additional water for the practicably irrigable boundary lands. In their response, the state parties argued that there had been no final determination of any of the various boundary disputes and urged the Court to allow a Special Master to address them.[19]

Special Master Tuttle was appointed to hear pending matters. He entertained briefs and argument on several threshold legal issues, including whether the boundaries of the reservations had been "finally determined" within the meaning of the 1964 and 1979 decrees. The United States and the Tribes contended that certain secretarial orders had "finally determined" the boundaries on all five mainstream reservations. The Special Master accepted the contentions of the United States and the tribes and declined to review the validity of the various boundary determinations.[20] The state parties sought interlocutory review of that decision by the Court,[21] which was denied. 444 U.S. 1009 (1980).

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18. *Id.* at 12 (emphasis added).

19. Response of the States of Arizona, California, and Nevada, and the Other California Defendants to the Motion of the United States for Modification of Decree at 11, 22-25 (Feb. 14, 1979).

20. Memorandum and Report on Preliminary Issues (Aug. 28, 1979).

21. Motion of the States of Arizona, California, and Nevada and the other California Defendants for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle and for Stay Order; Exceptions; and Opening Brief of Said Parties In Support of Their Motion and Exceptions (Nov. 1979).

Special Master Tuttle's final report reaffirmed his earlier decision on the boundary issues.[22] In their exceptions to that report, the state parties stated their position on the scope of Article II(D)(5):[23]

> Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the state parties have not objected to its application to the other reservations as well. Accordingly, the stipulated Decree of 1979 contains the proviso respecting possible adjustment of water allocations for all five reservations.

Arizona v. California, 439 U.S. 419 (1979).

The Court's decision in *Arizona II*, 460 U.S. 605 (Mar. 30, 1983), explained the effect of the 1979 Decree:

> Our Supplemental Decree of 1979 did not rule on these motions [of the Tribes to intervene] or resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations. . . .

Id. at 634.

After reviewing the merits, the Court rejected the Secretarial orders on the Fort Mojave, Colorado River, and Fort Yuma Reservations as "final determinations" adequate to bind third parties. *Id.* at 636-37. To permit the tribes their day in court to demonstrate irrigable acreage in the event boundary lands were "finally determined" within the standards of *Arizona II*, the 1984 Supplemental Decree revised Article II(D)(5):

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22. Report of Special Master Tuttle at 55.

23. Exceptions of the States of Arizona, California, and Nevada and the Other California Defendants to the Report of Special Master Elbert P. Tuttle; and Brief of Said Parties in Support of Exceptions at 60 n. 29 (May 20, 1982).

> [T]he quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1 (Chemehuevi], 2 [Cocopah], 3 [Fort Yuma], and 4 [Colorado River] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

466 U.S. 144, 145 (1984).

2.4 *The Settlement of Indian Claims Commission Docket 320*

In *Arizona II* (March 30, 1983), the Court ruled that while the December 1978 decision of the Secretary addressing the Fort Yuma boundary lands was not a "final determination" required to bind third parties in a water rights claims proceeding, it did clarify the boundary land issue as between the Tribe and the United States. Accordingly, on May 26, 1983, in anticipation of trial in Indian Claims Commission Docket 320 (Docket 320) the United States and the Tribe referenced the 1978 secretarial order in a joint memorandum regarding stipulations. Stipulation 9 provided:[24]

> If the December 20, 1978, Secretarial order is upheld, the proper measure of damages for the portions of the Reservation which were permanently acquired from the Quechan is the fair market value

24. Stipulation 10 explained that the lands that had been permanently acquired from the Reservation were expressly set out by the Secretary in the Federal Register on January 30, 1981, and included the All-American Canal, other interests of the Bureau of Reclamation, and third party leases and rights-of-way had been acquired over the years. "The Secretarial order of December 20 1978 excludes from the recognition of the trust status of the lands within the 1884 exterior boundaries, those lands as to which valid rights were acquired by third parties before or after 1884 and reclamation work projects constructed on the reservation pursuant to statutes after 1884." Those exceptions are described in detail in the secretarial Determination and Directives signed by Secretary Watt on January 30, 1981, and published in 46 Federal Register at 11,372 (Jan. 30, 1981).

> of those portions of the Reservation on the effective dates of the permanent acquisitions. No stipulation is entered into as to the measure of damages for the temporary deprivation of those lands which were reaffirmed by the executive order of December 20, 1978, or of those lands which, after a period of temporary deprivation, were permanentiy acquired.

Prior to the May 26, 1983, trial stipulation, on April 20, 1983, in anticipation of trial commencing June 20, 1983, the Tribe had authorized a final settlement offer. That settlement offer was accepted by the United States on June 15, 1983. On August 9, 1983, the Tribe and the United States entered into a second stipulation, this one for settlement and entry of final judgment. That second stipulation was incorporated by the Court of Claims in its August 9, 1983, judgment.

The August 1983 judgment of the Court provided:

> Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and [sic] any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims or offsets.

Stipulation for Settlement and Entry of Final Judgment (Aug. 9, 1983), Appendix A.

Included in the stipulation as Exhibit 4 and incorporated into the judgment was a confirmation by the United States that settlement of the claims in Docket 320 encompassed both

"claims of the Quechan Tribe for damages for the taking of parts of their Reservation after 1893 and the loss of use of other parts of the Reservation from 1893 to 1978."[25]

Upon entry of the judgment, the Quechan Tribe received $15 million and dismissed with prejudice its claims against the United States. Clearly, the stipulated settlement only involved claims against the United States. Clearly it did *not*, on its face or otherwise, establish reservation boundaries.

Subsequent to the entry of judgment in Docket 320, this Court ruled that:

> [T]he quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1 (Chemehuevi], 2 [Cocopah], 3 [Fort Yuma], and 4 [Colorado River] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Arizona v. California, 466 U.S. 144, 145 (1984) (supplemental decree).

It is clear that determination of boundaries was still an issue to be resolved, even after entry of the judgment in Docket 320.

2.5 *The Metropolitan Water District v. United States Proceedings*

In *Arizona II* (March 30, 1983), this Court rejected Special Master Tuttle's "final determination" recommendations and directed the state parties to pursue a federal court action to secure a "final determination" of the boundary lands issues:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United

25. Appendix A (letter of the Department of the Interior, July 27, 1983, Exhibit 4 to the Joint Motion to Stipulate and made a part of the judgment of the Court of Claims).

> States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Arizona II, 460 U.S. at 636, 638 (footnotes omitted).

In 1981, *Metropolitan Water District* was filed to litigate the status of all three boundary lands, including the Fort Yuma boundary lands. However, this Court affirmed the Court of Appeals for the Ninth Circuit dismissal of the action for lack of jurisdiction. *California v. United States*, 490 U.S. 920 (1989), *aff'g Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987).

In 1989, in light of the dismissal of *Metropolitan Water District,* the state parties moved to reopen the 1964 Decree in *Arizona I* for the purpose of securing a "final determination" of the three Indian reservation boundary lands. The United States and the tribes did not oppose the state parties' motion and on October 10, 1989, the Court ordered the decree reopened. *Arizona v. California*, 493 U.S. 886 (1989). Proceedings were commenced under the supervision of Special Master Robert McKay, who died in July of 1990, and thereafter, under Special Master Frank McGarr, who, after briefing, issued his opinions of September 6, 1991, January 20, 1992, and his Report and Recommendation of July 28, 1999, from which the Quechan Tribe files this Exception.

Although Special Master Tuttle recommended that an additional 41,347 acre-feet of water be allocated to the Quechan

Tribe for the disputed boundary lands, the Court rejected the recommendation on the grounds that the Reservation boundary had not been finally determined within the meaning of the 1964 Decree. The Court also rejected attempts to determine the boundary in *Metropolitan Water Dist.* This left the matter to determination in this proceeding.

However, Special Master McGarr has erroneously concluded that the final judgment approving the settlement of claims against the United States by the Quechan Tribe in Docket 320 bars adjudication of the Reservation boundary and water rights attached to the boundary lands.[26] According to the Special Master, there is to be no determination of the Reservation boundary. It is that ultimate conclusion to which the Quechan Tribe hereby makes exception.

3 EXCEPTION: COLLATERAL ESTOPPEL DOES NOT PRECLUDE THE ADJUDICATION OF QUECHAN BOUNDARY LANDS AND WATER RIGHTS IN THIS CASE.

The Special Master's conclusion denies the Quechan Tribe a substantial portion of its Reservation and attendant water rights. It seems to foreclose ever determining the boundaries of the Fort Yuma Reservation. His views about the preclusive effect of the stipulated settlement and judgment in Docket 320 are incorrect as a matter of law and are inconsistent with precedent relating to the preclusive effect of consent judgments. His views, if accepted, will mean that the stipulation in Docket 320 bars determination of the Reservation boundary. The two parties to the stipulation in Docket 320, however, do not agree with this reading.

26. These lands total 6107 acres. Report of Special Master Tuttle at 254.

3.1 *According Preclusive Effect to an Unlitigated Stipulation and Consent Judgment in an Action Involving Parties Absent from the Initial Litigation Severely Prejudices the Quechan Tribe, Defeats the Expectations of the Parties, and Misapplies the Doctrine of Collateral Estoppel.*

In litigation to adjudicate the rights of various sovereigns, the Special Master erroneously applied the doctrine of collateral estoppel to bar the United States and the Quechan Tribe from obtaining a final determination of one of the remaining outstanding issues in this case.[27] The Special Master's erroneous conclusion misapplies the doctrine of collateral estoppel and defeats the expectations of all parties to this case, which at one time or another, believed that the boundary land dispute at issue here would be finally resolved by adjudication in this proceeding.

At the heart of the doctrine of collateral estoppel is the requirement that the issue sought to be precluded was actually litigated and necessary to a court's adjudication of the matter. As this Court has stated:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue *and directly determined by a court of competent jurisdiction* . . . cannot be disputed in a subsequent suit between the same parties or their privies."

Montana v. United States, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897); emphasis added). The Court has been similarly

27. The Special Master does not state separate findings and conclusions; rather his conclusions are in large part merged into the text of the Report and Recommendation. Consequently, the Tribe's exception relates to the ultimate conclusions hereinafter specified and to all incidental determinations involved in reaching those ultimate conclusions.

unequivocal in defining what it means for an issue to be actually decided. In *Montana* the Court confirmed that in order to preclude an issue previously determined, the Court must find that:

> [T]he "question expressly and definitely presented in this suit is the same *as that definitely and actually litigated and adjudged*" adversely to the Government in state court.

440 U.S. at 157 (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924); emphasis added).

The reason for the "actually litigated" requirement of collateral estoppel is this:

> Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1979) (quoting *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952)); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980) (by relieving parties of the "cost and vexation of multiple lawsuits," conserving judicial resources, and preventing inconsistent decisions, collateral estoppel encourages "reliance on adjudication.").

Although the Court has broadened the application of collateral estoppel,[28] it has not abandoned the "actually litigated" requirement. Indeed, this Court and the Circuit Courts continue to recognize that the "actually adjudicated" requirement remains critical to invocation of the doctrine. In addition, the Court has recognized, where the litigation involves the United States, even where a prior judgment was the result of actual litigation,

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28. *E.g., Blonder-Tongue Laboratories, Inc.*, 402 U.S. 313 (1971) (abandoning requirement of mutuality of parties); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (approving conditionally the offensive use of collateral estoppel by a nonparty to a prior action).

collateral estoppel may not preclude the United States from relitigating the issue. *United States v. Mendoza*, 464 U.S. 154, 162-63 (1984). Of course, here we do not suggest that the United States wants to "relitigate" the issue–since it has never been litigated.

The doctrine of collateral estoppel serves dual purposes. First, the doctrine protects "litigants from the burden of relitigating an identical issue with the same party or his privy." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971). Second, it promotes judicial economy by "preventing needless litigation." *Id.*

Obviously, neither of these purposes are involved here. First, the two litigants in Docket 320 agree that it is not preclusive as to the boundary question and do not bear a "burden of relitigating an identical issue" as between themselves. Second, the question of the extent of the reservations was *never* litigated and there is, thus, no "needless litigation." Any judicial economy with respect to Docket 320 is not affected because it was resolved by a stipulated settlement, not trial. Special Master Tuttle has already determined the amount of additional allocation for the boundary lands. Only the underlying legal questions remain concerning the failure of conditions of the 1893 Agreement and the effect of the 1978 secretarial order. Those issues were not addressed or resolved by the consent judgment in Docket 320. A heavy burden is placed on the sovereign parties by *not* adjudicating a significant and vexatious question.

An examination of the consent judgment entered in Docket 320 shows that the issue of the Reservation boundary and disputed boundary lands was not actually litigated nor decided. To the contrary, prior to trial the parties entered into a stipulated settlement and confirmed it with the following judgment:

> Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred

> thereby from asserting any further rights, claims, or demands against the defendant and [sic] any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

This language sets forth the rule of res judicata–namely, that as between the Quechan Tribe and the United States, each party waives any claim it asserted or could have asserted against each other.[29]

But simply because the Tribe and the United States agreed to never again litigate the subject matter of Docket 320 as between themselves does not foreclose them from seeking to determine the boundary of the Reservation and the water rights associated with the disputed boundary lands. Indeed, the express language of the settlement states that it is "a compromise and settlement and shall not be construed as an admission by either party for purposes of precedent or argument in any other case." Appendix A.

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29. This language was required by 25 U.S.C. § 70u, which provides:

> A final determination against the claimant made and reported in accordance with this act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

The plain language of the settlement bars the United States and the Tribe from relitigating between themselves the historical claims and damages relating to the Fort Yuma Reservation lands at issue in Docket 320. *Nevada v. United States*, 463 U.S. 129 (1983); *United States v. Southern Ute Tribe*, 402 U.S. 159 (1971).

The Docket 320 judgment illustrates why the courts are not inclined, in the absence of express findings of fact, to give preclusive effect to consent judgments. *E.g., Levinson v. United States*, 969 F.2d 2600, 264 (7th Cir.), *cert. denied*, 506 U.S. 989 (1992); *Gall v. South Branch Nat'l Bank of S.D.*, 783 F.2d 125, 127 (8th Cir. 1986); *see also* 18 Moore's Federal Practice (3d ed.) § 132.02 [2][I][I] (1997). The petitions in Docket 320 asserted both taking and trespass damages. Upon trial, the Tribe could have obtained takings damages, implying that title was in the United States. Or, the Tribe could have obtained trespass damages, implying that title remained in the Tribe. The July 27, 1983, letter of the Acting Deputy Assistant Secretary of Indian Affairs approving the Tribe's settlement of Docket 320, incorporated as part of the final judgment, confirms that the settlement of Docket 320 embraced both claims.[30] The settlement was not premised on one theory over the other. Nor can one conclude from the stipulated settlement that Reservation boundaries, land title and water rights were to be affected.

One obvious question is, what could the settlement have been for? This does not appear from the record in the case. The funds paid to dismiss the claims of the Tribe against the United States in Docket 320 could have been for a number of things, including damages for trespass on Indian land, or damages due to the building of the All-American Canal (unlined canals are notoriously damaging to surrounding areas), or damages in the nature of trespass for use of tribal water, or taking of land or water, to name a few. In other words, it could have been for any number of things. However, the Special Master's assumption that it was for the diminishment of the Reservation or the reduction of the Reservation assumes far more than is indicated anywhere on the face of the stipulation or the relevant pleadings in Docket 320. As will be demonstrated in the next section, it

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30. The approval by the Department of Interior dated July 27, 1983, was incorporated by the parties into their July 29, 1983, stipulation and the stipulation in turn was made a part of the settlement order of the court dated August 9, 1983.

does not appear that it was a settlement of the location of Reservation boundaries nor that it was meant to diminish the Reservation nor was it meant as a sale of water rights from the Tribe.

3.2 *Neither the United States nor the Quechan Tribe nor the Other Parties to this Action Understood that the Stipulated Settlement Would Bar a Final Adjudication of the Boundary Lands or Water Rights.*

Collateral estoppel is an equitable doctrine:

> Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it. . . . Its application is controlled by the principles of equity. . . . [F]airness to both parties must be considered when it is applied.

Nations v. Sun Oil Co. (Delaware), 705 F.2d 742, 744-45 (5th Cir.) (on petition for rehearing and suggestion for rehearing en banc), *cert. denied*, 464 U.S. 893 (1983) (quoted in *Jack Faucett Assoc. v. American Tel. & Tel.*, 744 F.2d 118 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (citing multiple authorities). The Fifth Circuit has similarly noted:

> The doctrines [or res judicata and collateral estoppel] must be used . . . not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation.

Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313, 1316 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

To use the doctrine here to deny the Quechan Tribe a determination of the boundaries of its Reservation would be to use the doctrines as a club to deny the Tribe's right to a hearing. Neither the United States nor the Tribe intended their settlement of Docket 320 to prevent either party from seeking a final determination of Reservation boundaries and the amount of

water that attaches to those lands. The letter of the Tribe's claims attorney confirms that it was in the Tribe's interest to settle the claims encompassed within Docket 320 with the United States in 1983 prior to any judicial review of the 1978 Secretarial Order. Appendix B (letter from Tribal Attorney to Vincent Harvier, President, Quechan Tribal Council (July 6, 1983)).

In the present case, use of extrinsic evidence makes it unmistakably clear that neither the United States nor the Quechan Tribe intended their settlement of Docket 320 to prevent either party from seeking a final determination of the Fort Yuma boundary lands and, of course, a determination of the amount of water that attaches to those boundary lands. On July 6, 1983, the Tribe's claims attorney described to the Quechan Tribal Council the rationale for settlement.

> In 1971 the Quechan Tribe retained me to prepare and prosecute claims for reaffirmation of their 1884 title and for damages in Docket 320. First, I was requested to take whatever action was necessary to obtain for the Tribe a reaffirmation to its title to the reservation as established in 1884. Second, I was to pursue the damage claim which the Quechan Tribe had pending for 20 years against the United States before the Indian Claims Commission, known as Docket 320. As a result, I went to work immediately on both matters, devoting my main efforts, of course, to reaffirming your ownership of the reservation. My efforts were crowned with success in December of 1978, when the Secretary of the Interior issued an order reaffirming that the United States holds title to the lands within the 1884 reservation boundaries in trust for the Quechan Tribe (except those lands to which third parties had acquired title, such as the Bard lands). *The decision allowed us to go forward with the claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893*

and the loss of use of other parts of the reservation from 1893 to 1978.

. . . . .

Mr. Kilpatrick and I analyzed the facts and concluded that we could present persuasive evidence that the Quechan Tribe sustained damages by the loss of the so-called Bard lands, the lands that were taken for levees, the lands taken for the All-American Canal, and the sand and gravel removed from the reservation. We *also developed evidence of loss of rental value from 1893 to 1978 for the restored irrigable farm lands both north and south of the All-American Canal. And we developed evidence of a loss of rental value during the same period for those lands lying along the Colorado River which could and should have been developed for waterfront recreational uses.* We therefore concluded that the evidence would support a judgment of at least $8,000,00.00 and at most $25,000,000.00.

Appendix B (letter dated July 6, 1983, from the Tribal Attorney to Vincent Harvier, President, Quachan Tribal Council; emphasis added).

This letter makes clear that the Tribe was advised that the attempt to confirm their title to disputed lands was "crowned with success" when the Solicitor ruled in their favor in 1978. The letter goes on to note that counsel developed evidence of "loss of rental value from 1893 to 1978" for certain irrigable lands. Counsel concluded that the evidence would support a judgment of at least $8 million and at most $25 million. The final settlement was for $15 million.

The letter of counsel confirms that it was in the Tribe's interest to settle Docket 320 with the United States in 1983 prior to any judicial review of the 1978 secretarial order, because, under the 1978 order, the Tribe could justify a larger dollar settlement based on ongoing trespass damages. If the 1978 order was overruled, then the Tribe would be compelled to seek taking

damages as of 1893, at a time when the Reservation lands were of limited value. The letter clarifies the Tribe's reasons for settlement. It does not contradict the settlement and should be considered by the Court in evaluating the effect of the settlement.[31]

Moreover, the unresolved status of the 1978 secretarial order as of August 1983, as well as the ongoing federal court litigation to determine the boundaries of the Fort Yuma Reservation for water rights purposes, *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), led the United States and the Quechan Tribe to insert in their 1983 settlement the following language: "The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." Appendix A. Neither the United States nor the Tribe intended this settlement to bar a definitive determination of Reservation boundaries or water rights in boundary areas.

The Special Master erroneously concluded that the Docket 320 consent judgment bars the parties to that judgment from seeking an adjudication of the boundaries of the Fort Yuma Reservation here. In the special circumstances of this case, collateral estoppel should not bar resolution of the water rights with respect to the disputed boundary lands because Docket 320 contains no specific findings demonstrating that the status of boundary lands were actually litigated or necessarily decided. Nor does the language of the consent judgment otherwise reveal any intent to bar litigation of the boundary land water rights. An issue is not litigated if it is the subject of a stipulation. *E.g., Sekaquaptewa v. MacDonald*, 575 F.2d 239, 247 (9th Cir. 1978) (parties in previous litigation stipulated to survey lines by stipulating to use of map; challenged boundary was neither actually litigated nor necessarily decided).

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31. Moreover, it does no violence to the parole evidence rule. That is, the description of the Tribe's counsel does not contradict the consent agreement. Rather, it explains the consent agreement.

3.3 *Without Findings and Conclusions, Docket 320 Cannot Have Preclusive Effect.*

Even if the issue of the boundary lands had been litigated, it is well established that consent judgments that lack findings of fact or determinations of issues are not accorded preclusive effect. In *Lawlor v. National Screen Serv.*, 349 U.S. 322 (1955), this Court declined to give collateral estoppel effect to a settlement agreement between the parties then before the Court because the consent judgment was "unaccompanied by findings and hence, did not bind the parties on any issue . . . which might arise in connection with another cause of action." *Id.* at 327. *See also Avondale Shipyards Inc. v. Insured Lloyds*, 786 F.2d 1265, 1272 (5th Cir. 1986) (judgments based on parties' stipulation are not entitled to collateral estoppel effect in a later action); *United States v. California Portland Cement Co.*, 413 F.2d 161, 163 (9th Cir. 1969) (same).

Similarly, in *United States v. International Bldg. Co.*, 345 U.S. 502 (1953), this Court stated:

> Certainly the judgments entered are res judicata of the tax claims for the years 1933, 1938, and 1939, whether or not the basis for the agreements on which they rest reached the merits. *But unless we can say that they were an adjudication of the merits, the doctrine of collateral estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. . . .* A judgment entered with the consent of the parties may involve a determination of questions and fact and law by the Court. But, unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

Id. at 506 (emphasis added).

The courts recognize that consent judgments will support claim preclusion but not issue preclusion. *International Bldg. Co.*, 345 U.S. at 506; *Avondale*, 786 F.2d at 1272; Restatement (Second) of Judgments, § 27 comment e (1982) (stating that a matter is not actually litigated within the requirement of collateral estoppel if it is the subject of a stipulation between the parties).

The absence of findings and conclusions in Docket 320, and the absence of detailed recitals as to the issues (if any) to be determined, is a critical distinction between the judgment involved there and judgments of the Indian Claims Commission that have been given preclusive effect. *E.g., United States v. Pend Orielle Public Util. Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), *cert. denied*, 429 U.S. 982 (1976). In *Pend Orielle*, the Ninth Circuit cited specified Indian Claims Commission findings when it concluded that the tribe there had been deprived of its entire tract and received no compensation. *Id.* at 1507. Similarly, in *Gemmill*, the Ninth Circuit, again citing specific findings by the Indian Claims Commission, concluded that there had been an uncompensated taking by the United States. *Id.* at 1149.

3.4 *The Special Master's Report and Recommendation Erroneously Assumes That the Boundary Lands Were Ceded.*

A basic assumption in the Special Master's conclusion is that the Quechans ceded their lands and were paid for those lands in Docket 320. However, this basic assumption is wrong, and the Special Master's report bars questions of cession from ever being adjudicated. Barring an adjudication of the Quechan Tribe's rights in disputed boundary lands is particularly unjust when the record shows that the conditions precedent to the Tribe's cession of those lands were never met. The 1893 Agreement was "accepted, ratified and confirmed" by Congress in § 17 of the Act of August 15, 1894, 28 Stat. 286, 335 (1894). Congress required the Colorado River Irrigation Company, to which a right-of-way had been granted the previous year, to

begin construction of the canal required to bring water to the Reservation within three years or forfeit the right-of-way. The Act also provided that "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws." *Id.* The 1894 Act was clearly intended to ratify and put into effect the 1893 Agreement.

The 1893 Agreement itself can be summarized as follows.

In Article I, the Quechan Indians, "upon the conditions hereinafter expressed," relinquished all their right, title, claim or interest in the Fort Yuma Reservation.

Article II provided for the allotment of five acres to each individual Indian.

Article III provided for the selection of allotments and the disposition of the residue of the reservation which was subject to irrigation. The unallotted irrigable lands were to be surveyed and subdivided into 10-acre tracts. The tracts were to be appraised subject to the approval of the Secretary of the Interior and sold at public sale for not less than the appraised value. After a second public offering, the Secretary of the Interior was empowered to sell the tracts at private sale for not less than the appraised value.

Article IV provided that the proceeds from such sales would be placed in the Treasury to the credit of the Quechan Indians with interest at a given percent per annum, subject to appropriation by Congress or application by the President for the payment of water rents, the building of levees, irrigation ditches and laterals, the construction and repair of buildings, the purchase of tools, farm implements and seeds, and the education of the Quechans.

Article V authorized the Secretary to issue 25-year trust patents to the allottees.

Article VI provided that all lands not subject to irrigation were to be opened to settlement under the general land laws.

Article VII excepted from the operation of the agreement a tract of land, with buildings, to be used as an Indian school. Appendix A.

A condition that each male adult would receive one acre-foot of water per year for growing crops, for a period of ten years was added by the ratifying Act. Act of August 15, 1894 28 Stat. 332.

None of the conditions were ever completed. The canal was never built, the canal company was evicted from the Reservation in 1898, the irrigated lands were never identified, and the non-irrigated lands were never opened to public entry, and no Indian received free water. *See* Opinion of the Solicitor, 86 I.D. 1 (Dec. 20, 1978).

Congress treated the Quechan cession differently from other cessions ratified in the same act. In the 1894 Act, Congress also ratified a series of other reservation cessions. In contrast to the Quechan agreement, each of the other cession agreements specified an unconditional sale and relinquishment of Indian title. Only the Quechan agreement was conditional.

For example, with respect to the agreement covering lands of the Yankton Tribe of South Dakota Indians, Congress approved an agreement whereby the Indians "hereby cede, sell, relinquish, convey to the United States all their claim, right, title and interest . . ." In consideration for such lands ceded, sold, and relinquished, the United States agreed to pay the Yankton Tribe $600,000. 28 Stat. at 290. Congress also ratified an agreement with the Yakima Indians whereby the Indians "hereby cede and relinquish to the United States all their right, title, interest, claim, and demand" in certain lands, and in consideration of the cession, the United States agreed to pay the Yakima Indians $20,000. *Id.* at 320. Similarly, the ratification of an agreement for the Coeur D'Alene Indians provided that the Indians "do hereby cede, grant, and relinquish to the United States all right, title, and claim" to a certain portion of their Reservation, and in exchange the United States agreed to pay the Indians $15,000. *Id.* at 322. Again, with respect to the Siletz

Indians, those Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in all the unallotted lands" of their Reservation and, in exchange, the United States agreed to pay the Indians $242,000 in "cash and in other considerations." Finally, Congress also ratified an agreement with the Nez Perce whereby the Nez Perce Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in the unallotted lands of their Reservation and, in exchange, the United States agreed to pay the sum of $1,626,222.00." *Id.* at 326.

In contrast, the Quechan Indians agreed to surrender and relinquish to the United States all of their right, title, claim, and interest to a portion of their Reservation, but only "upon the conditions hereinafter expressed." No specific and immediate consideration was to be paid to the Quechan Indians as the United States had agreed in the other cession agreements as were ratified on August 15, 1894. Indeed, the only cash-equivalent consideration to be paid to the Quechan Indians for the cession of their land was an uncertain amount of revenue to be derived from the future sale of a portion of the Reservation's irrigable lands.

3.5 *The Special Master's Report Has the Effect of Reinstating the Overruled Solicitor's 1936 Opinion.*

The Special Master's decision in this case ignores this tortured history, and, in effect, without benefit of fact finding or other legal process, reinstates the effects of the overruled Margold opinion of 1936. Before 1936, the Bureau of Indian Affairs' treatment of the boundary lands confirms that the United States did not consider the lands to have been ceded. Before 1936, records of the Tribe and of the United States show a consistent history of administration of the non-irrigable lands by the Bureau of Indian Affairs. This administrative record includes Reservation maps, Bureau of Land Management plat records, sand and gravel leases, and correspondence of the Commission of Indian Affairs and the Director of Reclamation

Service.[32] Such supervision included the execution and management for four decades of Indian permits, Indian rights-of-way, and Indian leases. There exists no record between 1894 and 1936 where the Indian office or the Secretary of the Interior denied approval of a permit, lease, or right-of-way within the non-irrigable lands on the basis that the lands were no longer Indian lands. Nothing in the historical record challenged the jurisdiction of the Bureau of Indian Affairs during this time period.[33]

The 1936 Solicitor's opinion dramatically changed the administration of the boundary lands: It essentially transferred jurisdiction from the Bureau of Indian Affairs to the Bureau of Reclamation. The 1936 opinion operated to immediately terminate a previously uninterrupted pattern of Bureau of Indian Affairs supervision over the non-irrigated lands. More importantly, however, the 1936 opinion also gave the Bureau of Reclamation the green light to build the All-American Canal without the consent of the Quechan Indians.

The events relied on in the 1936 opinion do not support that opinion nor the Special Master's conclusions. Irrigation commenced under the 1904 Reclamation Act does not effect a cession itself nor evidence a cession under the 1893 Agreement. The 1904 Act authorized reclamation lands for the Colorado River Reservation as well as the Fort Yuma Reservation and also includes both Indian and non-Indian lands. That is, irrigation under the 1904 Act was implementing new public reclamation policies, not executing a private contract.

The independence of the 1904 Act from the 1893 Agreement is supported by key differences in the 1894 Act ratifying the

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32. *See* Opinion of the Solicitor, 86 I.D. 1 (1978).

33. While an earlier Solicitor's Opinion, 84 I.D. 1, 20 (1977), took the position that the Bureau of Indian Affairs administration of these lands was inconsistent, that analysis conceded that those federal employees who took the view that the Indians had ceded the non-irrigable lands nevertheless frequently administered the lands as if they were Indian lands.

agreement and 1904 Act. The 1904 Act utilized procedures that were different than those carefully described in the 1893 Agreement. The 1894 Act provided for the United States to bear the cost of surveying and appraising the surplus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5 percent per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must provide for ten years free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction.

In contrast, the 1904 Act was silent about free water. It also credited to the Indians only that portion of the proceeds of sale of surplus irrigable land reflecting the value of the land before reclamation. Otherwise, the surplus irrigable lands were simply opened to settlement under the homestead laws rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Out of the amount the Tribe received under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge under the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians without provision for interest, as contrasted to the 5 percent interest provided in the 1894 Act.

The 1893 Agreement and the 1904 Act make it clear that the failure of conditions undermined the time of performance (a 15-year delay) and, of greater significance, the defect fundamentally rewrote the 1893 Agreement from a pledge to irrigate the best lands for the benefit of the Indians. To the contrary, in the period 1910 through 1920, the Indians received the least desirable lands and continue today to lag behind the non-Indian newcomers who acquired the best Reservation lands from the United States without the "benefit" of a previously

negotiated agreement to irrigate conditioned on the delivery of Colorado River irrigated water to the best lands of the Quechan Indians. That condition did not occur. Failure of the United States to implement the 1893 Agreement means, under the terms of the agreement itself, that both the irrigated and non-irrigated lands were not immediately ceded. That was not the plan for the Fort Yuma Reservation. The plain language of the 1893 Agreement makes it apparent that at Fort Yuma the United States' obligation to pay compensation would not materialize until proceeds from the sale of irrigated lands were received by the United States.

All this is ignored by the Special Master's conclusions. The Tribe must have a chance to present its case on the merits of the status of Reservation boundaries.

4 CONCLUSION.

The Court refused to rule on the nature, extent, and irrigability of the Fort Yuma boundary lands in *Arizona II* because it set aside Special Master Tuttle's findings that the 1978 secretarial order constituted a final determination of the status of the boundary lands. That status still needs to be determined.

In this current proceeding, Special Master McGarr declined to finally determine the status of the boundary lands, instead giving a settlement document in an Indian Claims Commission case (Docket 320) preclusive effect. Yet nothing in the stipulated settlement says anything about Reservation boundaries. It only settles claims and potential claims between the United States and the Tribe. It is clear that the reasoning of the 1978 Solicitor opinion is correct, and that the boundary lands remain in the possession of the United States in trust for the Quechan Tribe and that the Tribe is entitled to an additional allocation of 40,734 acre-feet of water, based on Special Master's Tuttle's finding that 6107 acres of the boundary lands are irrigable.[34]

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34. Report of Special Master Tuttle at 254.

Barring a determination to that effect, the Court should reject the Report and Recommendation of Special Master McGarr and hold that collateral estoppel does not bar the Quechan Tribe from seeking an adjudication of the reservation boundaries and water rights, and remand the matter to the Special Master for trial on the merits.

Respectfully submitted this day 20th of December, 1999.

MASON D. MORISSET
Counsel of Record
K. ALLISON MCGAW
MORISSET, SCHLOSSER, AYER & JOZWIAK
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509
(206) 386-5200

APPENDIX

APPENDIX A — STIPULATION FOR SETTLEMENT AND ENTRY OF FINAL JUDGMENT (INCORPORATES UNITED STATES LETTER OF JULY 27, 1983) DATED AND FILED AUGUST 9, 1983

RAYMOND C. SIMPSON
In Association with
KILPATRICK, CLAYTON, MEYER & MADDEN
2032 Via Visalia
Palos Verdes Estates, CA 90274

Attorneys for Plaintiff

IN THE UNITED STATES COURT OF CLAIMS

DOCKET 320

QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR SETTLEMENT AND ENTRY OF FINAL JUDGMENT

The parties, by counsel, hereby stipulate that the above-entitled claim should be settled, compromised, and finally disposed of by entry of final judgment as follows:

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1. There shall be entered in the action a net judgment, without offsets, for plaintiff in the amount of Fifteen Million Dollars ($15,000,000.00). Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

2. The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case.

3. The final judgment of the United States Claims Court, pursuant to this stipulation, shall constitute a final determination by the court of the above-captioned case and shall become final on the day it is entered, all parties hereto waiving any and all rights to appeal from or otherwise seek review of such final determination.

4. Attached to this stipulation and incorporated by reference are: a resolution approving the settlement adopted by the Quechan Tribal Council, plaintiff's governing body, on June 16, 1983; a resolution adopted at a meeting of the

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adult members of the Quechan Tribe of Indians held at Yuma, Arizona, on July 8, 1983; and a further resolution ratifying the action of the members and reaffirming the approval of the settlement by the Quechan Tribal Council adopted July 8, 1983; all of said resolutions authorizing counsel for plaintiff to enter into this stipulation, as set forth herein; and a copy of the letter approving the settlement of this litigation by the Department of the Interior or its authorized representative. (Exhibits 1-4.)

DATED: July 12, 1983.

RAYMOND C. SIMPSON and
KILPATRICK, CLAYTON,
MEYER & MADDEN

By: s/ Raymond C. Simpson
RAYMOND C. SIMPSON
Attorneys of Record for Plaintiff

DATED: July 29, 1983.

F. HENRY HABICHT, II
RICHARD L. BEAL

By: s/ Richard L. Beal
RICHARD L. BEAL
Attorney for Defendant

By: s/ F. Henry Habicht, II
F. HENRY HABICHT, II
Acting Assistant Attorney General
Land and Natural Resources
Division

Appendix A

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Tribal Government Services (AD)

Raymond C. Simpson, Esquire
2032 Via Visalia
Palos Verdes Estates, California 90274

Dear Mr. Simpson:

By letter dated July 11 you requested consideration and approval of a proposed compromise to settle the claims of the Quechan Tribe of Indians in Docket No. 320 for a net final judgment of $15,000,000. This case involves claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978.

The claims in Docket No. 320 are being prosecuted by you under contract No. H50C14207367. This contract was made on February 10, 1971, and duly approved by the Phoenix Area Director. The term of the contract is effective through April 10, 1985.

Pursuant to authority granted to you by the Quechan Tribal Council, you submitted a letter to the Department of Justice offering to settle the claims in Docket No. 320 for $15,000,000. Your offer was accepted by the Acting

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Assistant Attorney General by letter dated July 8, 1983, with conditions. Among the conditions were that the proposed settlement be approved by appropriate resolutions of the governing body and the general membership of the tribe. In addition, approval of the settlement as well as the resolutions of the tribe must be secured from the Secretary of the Interior or his authorized representative.

Entry of judgment in this case shall finally dispose of all claims which the tribe has asserted or which the tribe could have asserted against the defendant under the Indian Claims Commission Act in Docket No. 320.

For purpose of obtaining consideration and approval of the settlement from the general membership of the tribe, a claims settlement meeting was scheduled and held on July 8, 1983, at the Quechan Tribal Office. Prior to the meeting, notices were posted throughout the reservation and mailed to the tribal members.

QUECHAN GENERAL MEMBERSHIP MEETING

On July 8, 1983, the general membership claims settlement meeting was convened at 2:15 p.m. by Vincent Harvier, President, Quechan Tribal Council. Approximately 70 people were in attendance. President Harvier explained to the tribal members the extensive involvement the tribal council has had in the settlement negotiations and his observations of what transpired at a hearing on these claims held the previous month before the United States Claims Court. After some discussion and comments by the tribal council members, you were asked to give your presentation.

You gave a thorough and concise description of the history of the claims and explained the terms of the proposed settlement. Afterwards, Mr. George Bryant, a tribal member, translated the written summary of your explanation into the Quechan language. Those present were then given an opportunity to comment on and ask any questions they may have concerning the settlement. The Bureau observers report that those present at the meeting appeared to understand the nature of the claims and the terms of the proposed settlement.

After some discussion of the settlement, President Harvier read the proposed general membership resolution accepting the terms of the settlement. A motion was made and seconded to adopt the resolution. Quechan General Membership Resolution No. R-34-83 was adopted by a vote of *53 for and 2 opposed, with 4 abstentions.*

We are satisfied that appropriate steps were taken to publicize the Quechan general meeting held on July 8, 1983, so as to afford the tribal members an opportunity to attend the meeting and to consider and vote on the proposed settlement. The general meeting was properly conducted and the votes of the tribal members were fairly taken and reflected the views of the persons who voted. Quechan General Membership Resolution No. R-34-83 is hereby approved.

QUECHAN TRIBAL COUNCIL MEETING

After the general membership meeting, a duly called tribal council meeting was held for the purpose of considering and voting on the proposed settlement. A quorum of the council was present. The Quechan Tribal Council adopted

Resolution No. R-35-83 approving the proposed settlement by a vote of *4 for and none opposed.*

The Quechan Tribe is organized under a constitution and bylaws adopted pursuant to the Indian Reorganization Act. The constitution provides that the Quechan Tribal Council shall represent the Quechan Tribe in all affairs and shall have the power to present and prosecute any claims or demands of the tribe.

Resolution No. R-35-83, enacted on July 8, 1983, by the Quechan Tribal Council constitutes the action of the governing body of the tribe and is hereby approved.

The information furnished to us by you, our field officers, and information from other sources has satisfied us that the proposed settlement of the claims in Docket No. 320 is fair and just. The proposed settlement is hereby approved.

Sincerely,

By: s/ [illegible]
Acting Deputy Assistant Secretary
Indian Affairs (Operations)

APPENDIX B — LETTER OF QUECHAN TRIBAL ATTORNEY REGARDING SETTLEMENT IN DOCKET 320 DATED JULY 6, 1983

LAW OFFICES OF
RAYMOND C. SIMPSON

2032 VIA VISALIA
PALOS VERDES ESTATES, CALIFORNIA 90274
TELEPHONE 373-8592

July 6, 1983

Vincent Harvier
President
QUECHAN TRIBAL COUNCIL
Box 1352
Yuma, AZ 85364

Dear Mr. Harvier:

This letter is written as a summary of recent proceedings in the claim case, Quechan Tribe v. U.S., Docket 320, and of the settlement proposal that has been made, so that you may distribute it to the membership for the meeting of July 8, 1983.

In 1971 the Quechan Tribe retained me to prepare and prosecute claims for reaffirmation of their 1884 title and for damages in Docket 320. First, I was requested to take whatever action was necessary to obtain for the Tribe a reaffirmation of its title to the reservation as established in 1884. Second, I was to pursue the damage claim which the

Quechan Tribe had pending for 20 years against the United States before the Indian Claims Commission, known as Docket 320. As a result, I went to work immediately on both matters, devoting my main efforts, of course, to reaffirming your ownership of the reservation. My efforts were crowned with success in December of 1978, when the Secretary of the Interior issued an order reaffirming that the United States holds title to the lands within the 1884 reservation boundaries in trust for the Quechan Tribe (except those lands to which third parties had acquired title, such as the Bard lands). The decision allowed us to go forward with the claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978. At that time I associated Robert J. Kilpatrick with me as counsel for the prosecution of the claims case, and both Mr. Kilpatrick and I have devoted a very large amount of time to the analysis of the case and the preparation of the evidence to prove your damages.

The question we faced at that point was, now that the reservation had been restored, what damages could the Quechans claim? The United States took the position that the Quechans had no damage claim for the lands that had been restored. The United States contended that the only damages owed to the Quechans were for the lands that were not restored, such as the Bard lands and the lands taken for the All-American Canal. When we first talked to the lawyer handling the case for the United States, he valued your damage claim at about $1,000,000.00.

Mr. Kilpatrick and I analyzed the facts and concluded that we could present persuasive evidence that the Quechan

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Tribe sustained damages by the loss of the so-called Bard lands, the lands that were taken for levees, the lands taken for the All-American Canal, and the sand and gravel removed from the reservation. We also developed evidence of loss of rental value from 1893 to 1978 for the restored irrigable farm lands both north and south of the All-American Canal. And we developed evidence of a loss of rental value during the same period for those lands lying along the Colorado River which could and should have been developed for waterfront recreational uses. We therefore concluded that the evidence would support a judgment of at least $8,000,000.00 and at most $25,000,000.00.

We then considered the question of interest, because our appraiser, Robert G. Hill, had advised us that if interest were allowable, the total amount of the claim would exceed $100,000.000.00. We did exhaustive research on the question of interest and concluded, reluctantly, that the law and the court decisions clearly would not allow the Quechan Tribe to recover interest on its claim. Accordingly, the maximum amount we could hope to obtain would be the principal amount we have set forth above.

The United States, of course, strongly resisted our damage claims. It argued that it had no responsibility for "reasonable rental values" and that its liability would be limited to rentals actually collected, which totaled approximately $500,000.00. But as a result of the analysis we made and the evidence we presented to the United States, it subsequently revised its evaluation, first to $4,000,000.00, and then to $8,000,000.00. We rejected these values as inadequate and stated that we were prepared to go to trial.

Appendix B

A trial was set in the matter for June 20, 1983, and a lengthy and thorough pre-trial was held on June 8, 1983, in Washington, D.C. At the pre-trial, we made it clear that we were ready to go to trial, that we had all of our evidence in hand to prove our case, and that we were prepared to prove the damages set forth above. The pre-trial precipitated renewed negotiations, as a result of which we were able to negotiate a settlement with the United States of $15,000,000.00.

We have recommended to the Tribal Council that this settlement be accepted, and the Tribal Council concurs.

In our opinion, the sum of $15,000,000.00 is a fair and reasonable settlement of the claims of the Tribe. The outcome of the trial of any lawsuit is always uncertain. It is possible that a judgment for substantially more than $15,000,000.00 might have been obtained. It is equally possible that the Government's evidence would have been more persuasive and that the amount of the judgment would have been half of $15,000,000.00. I do not want to lay out in this letter any detailed discussion of the weak points in our evidence, but I assure you that there were weaknesses which the United States might and probably would have successfully exploited. And there was a real risk that the ultimate judgment would be much less than the amount of the settlement.

Moreover, if we had gone to trial and obtained a judgment for much more than $15,000,000.00, it is certain that this would have been appealed. That would have meant additional years of waiting with a large uncertainty as to the

ultimate outcome. If the judgment had been reversed, we would have been faced with further trial proceedings.

We were seriously concerned, also, with the consequences of the decision of the United States Supreme Court in Arizona v. California, where the Supreme Court refused to accept the Special Master's recommendation of additional water rights for the Quechan Tribe. The Supreme Court held that there must first be a court decision as to whether the Secretary of the Interior was correct in his 1978 order restoring the 1884 boundaries of the reservation. The United States argued that if the boundary question were decided against the Quechans, the tribe might lose its land and, with it, most of its claimed damages. We opposed the delay and the United States Claims Court refused to delay the trial, but we were gravely concerned that the ultimate outcome of any court decision on boundaries might seriously jeopardize your claims case. We therefore welcomed the opportunity to settle it at this time, thereby avoiding the risks involved in any subsequent litigation over boundaries.

For all of the above reasons it is our opinion that the $15,000,000.00 settlement is fair and reasonable and should be accepted by the Tribe.

Very truly yours,

By: s/ Raymond C. Simpson
RAYMOND C. SIMPSON
RCS: jk

APPENDIX C — 1893 AGREEMENT WITH THE YUMA INDIANS IN CALIFORNIA

SEC. 17. Whereas Washington J. Houston, John A. Gorman, and Peter R. Brady, duly appointed commissioners on the part of the United States, did on the fourth day of December, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Yuma Indians in the State of California, which said agreement is as follows:

"Articles of agreement made and entered into this 4th day of December, A. D. 1893, at Fort Yuma, on what is known as the Yuma Indian Reservation, in the county of San Diego, State of California, by Washington J. Houston, John A. Gorman, and Peter R. Brady, commissioners on the part of the United States appointed for the purpose, and the Yuma Indians.

ARTICLE I.

"The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of country in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows:

" 'Beginning at a point in the middle of the channel of the Colorado River, due east of the meander corner to sections nineteen and thirty, township fifteen south, range twenty-four east, San Bernardino meridian; thence west on the line between sections nineteen and thirty to the range

line, between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen south, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sisteen south, range twenty-one east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: PROVIDED, HOWEVER, That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made.

" 'It is also hereby ordered that the Fort Yuma military reservation be, and the same is hereby, transferred to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order, said military reservation having been abandoned by the War Department for military purposes.' "

ARTICLE II.

"Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five acres of land, which shall be allotted to such Indian in severalty. Each member of said band of Indians over the age of eighteen years shall be entitled to select his or her land, and the father, or, if he be dead, the mother, shall select the land herein provided for for each of his or her children who may be under the age of eighteen years; and if both father and mother of the child under the age of eighteen years shall be dead, then the nearest of kin over the age of eighteen years shall select and locate his or her land; or if such persons shall be without kindred, as aforesaid, then the Commissioner of Indian Affairs, or some one by him authorized, shall select and locate the land of such child.

ARTICLE III.

"That the allotments provided for in this agreement shall be made, at the cost of the United States, by a special agent appointed by the Secretary of the Interior for the purpose, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and within sixty days after such special agent shall appear upon said reservation and give notice to the said Indians that he is ready to make such allotments; and if anyone entitled to an allotment hereunder shall fail to make his or her selection within said period of sixty days then such special agent shall proceed at once to make such selection for such person or persons, which shall have the same effect as if made by the

person so entitled; and when all of said allotments are made and approved, then all of the residue of said reservation which may be subject to irrigation except as hereinafter stated, shall be disposed of as follows: The Secretary of the Interior shall cause the said lands to be regularly surveyed and to be subdivided into tracts of ten acres each, and shall cause the said lands to be appraised by a board of three appraisers, composed of an Indian inspector, a special Indian Agent, and the agent in charge of the Yuma Indians, who shall appraise said lands, tracts, or subdivisions, and each of them, and report their proceedings to the Secretary of the Interior for his action thereon; and when the appraisement has been approved the Secretary of the Interior shall cause the said lands to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof, first having given at least sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers of general circulation; and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders then the Secretary of the Interior may sell the same at private sale at not less than the appraised value.

ARTICLE IV.

"That the money realized by the sale of the aforesaid lands shall be placed in the Treasury of the United States, to the credit of the said Yuma Indians, and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress, or to application,

by order of the President, for the payment of water rents, building of levees, irrigating ditches, laterals, the erection and repair of buildings, purchase of tools, farming implements and seeds, and for the education and civilization of said Yuma Indians.

ARTICLE V.

"Upon the approval of the allotments provided for herein by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patent shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his or her decease, to his or her heirs or devisees, according to the laws of California, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs or devisees as aforesaid in fee, discharged of said trust and free of all incumbrance whatsoever.

"And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. And during said period of twenty-five years these allotments and improvements thereon shall not be subject to taxation for any purpose, nor subject to be seized upon any execution or other legal process, and the law of descent and partition in force in California shall apply thereto.

Appendix C

ARTICLE VI.

"All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States.

ARTICLE VII.

"There shall be excepted from the operation of this agreement a tract of land, including the buildings, situate on the hill on the north side of the Colorado River, formerly Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm not to exceed in all one-half section, or three hundred and twenty acres.

ARTICLE VIII.

"This agreement shall be in force from and after its approval by the Congress of the United States.

"In witness whereof we have hereunto set our hands and seals the day and year first above written.

WASHINGTON J. HOUSTON, (SEAL.)
JOHN A. GORMAN, (SEAL.)
PETER R. BRADY, (SEAL.)

Commissioners on the part of the
United States.

Appendix C

BILL MOJAVE, and others.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of making the allotments provided for in said agreement, including the payment and expenses of the necessary special agent hereby authorized to be appointed by the Secretary of the Interior, and for the necessary resurveys, there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of two thousand dollars, or so much thereof as may be necessary.

That for the purpose of defraying the expenses of the survey and sale of the lands by said agreement relinquished and to be appraised and sold for the benefit of said Indians, the sum of three thousand dollars, or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the same to be reimbursed to the United States out of the proceeds of the sale of said lands.

That the right of way through the said Yuma Indian Reservation is hereby granted to the Southern Pacific Railroad Company for its line of railroad as at present constructed, of the same width, with the same rights and privileges, and subject to the limitations, restrictions, and

conditions as were granted to the said company by the twenty-third section of the Act approved March third, eighteen hundred and seventy-one, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes:" PROVIDED, That said company shall, within ninety days from the passage of this Act, file with the Secretary of the Interior a map of said right of way, together with a relinquishment by said company of its right of way through said reservation as shown by maps of definite location approved January thirty-one, eighteen hundred and seventy-eight.

The Secretary of the Interior is hereby authorized and directed to cause all the lands ceded by said agreement which may be susceptible of irrigation, after said allotments have been made and approved, and said lands have been surveyed and appraised, and the appraisal approved, to be sold at public sale, by the officers of the land office in the district wherein said lands are situated, to the highest bidder for cash, at not less than the appraised value thereof, after first having given at least sixty days' public notice of the time, place, and terms of sale immediately prior to such sale, by publication in at least two newspapers of general circulation, and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders, then the Secretary may cause the same to be sold at private sale at not less than the appraised value. The money realized from the sale of said lands, after deducting the expenses of the sale of said lands, and the other money for which provision is made for the

reimbursement of the United States, shall be placed in the Treasury of the United States to the credit of said Yuma Indians, and shall draw interest at the rate of five per centum per annum, and said principal and interest shall be subject to appropriation by Congress, or to application by the President of the United States for the payment of water rents, the building of levees, irrigating ditches and laterals, the purchase of tools, farming implements and seeds, and for the education and civilization of said Indians: PROVIDED, HOWEVER, That none of said money realized from the sale of said lands, or any of the interest thereon, shall be applied to the payment of any judgment that has been or may hereafter be rendered on claims for damages because of depredations committed by said Indians prior to the date of the agreement herein ratified.

That all the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws.

That the Colorado River Irrigating Company, which was granted a right of way for an irrigating canal through the said Yuma Indian Reservation by the Act of Congress approved February fifteenth, eighteen hundred and ninety-three, shall be required to begin the construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act aforesaid shall be forfeited.

Appendix C

That the Secretary of the Interior shall have authority from time to time to fix the rate of water rents to be paid by the said Indians for all domestic, agricultural, and irrigation purposes, and in addition thereto each male adult Indian of the Yuma tribe shall be granted water for one acre of the land which shall be allotted to him, if he utilizes the same in growing crops, free of all rent charges during the period of ten years, to be computed from the date when said irrigation company begins the delivery of water on said reservation.

* * *

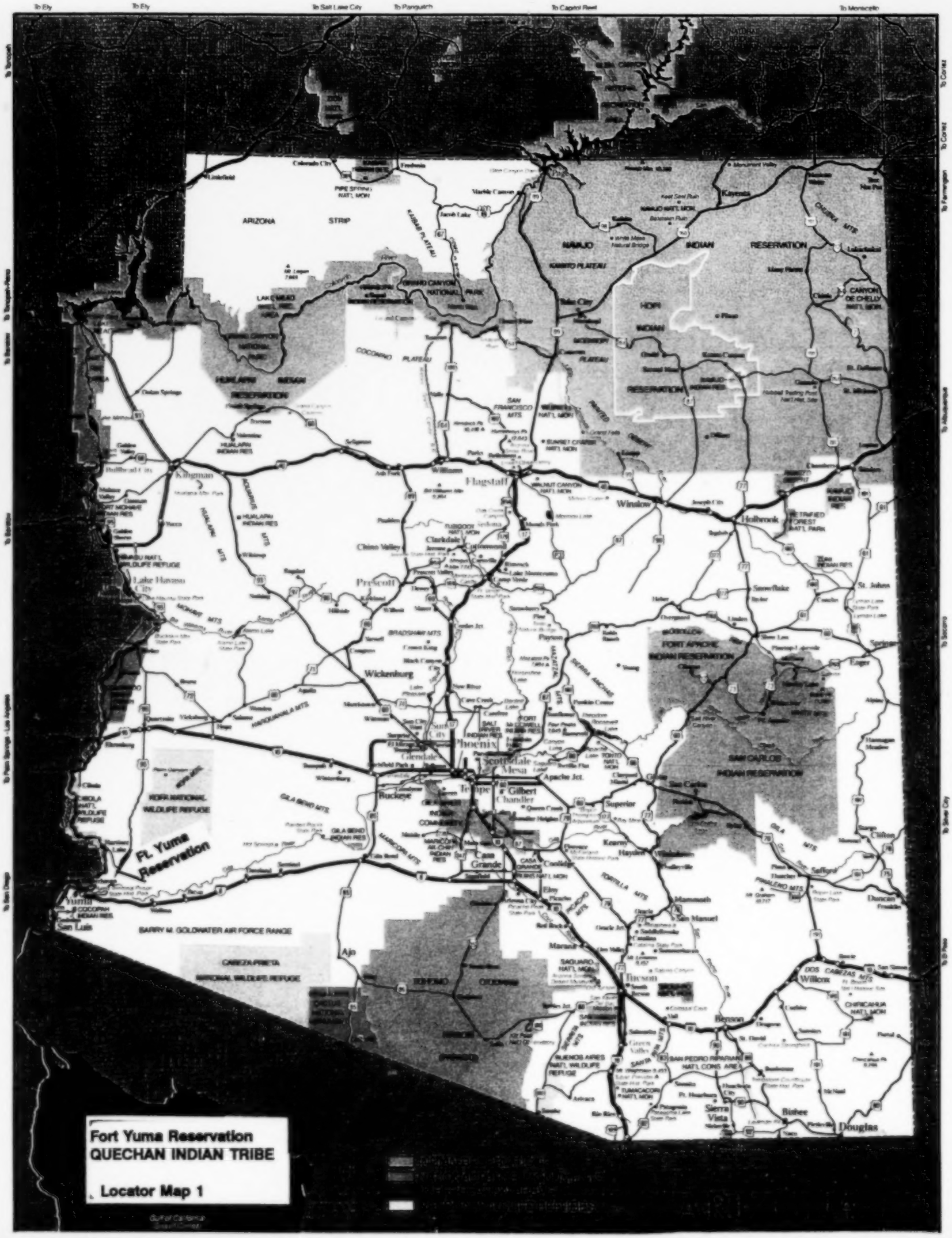
Approved, August 15, 1894. (28 Stat. 332) 1 Kappler 542-545

Pre-Trial Item 693

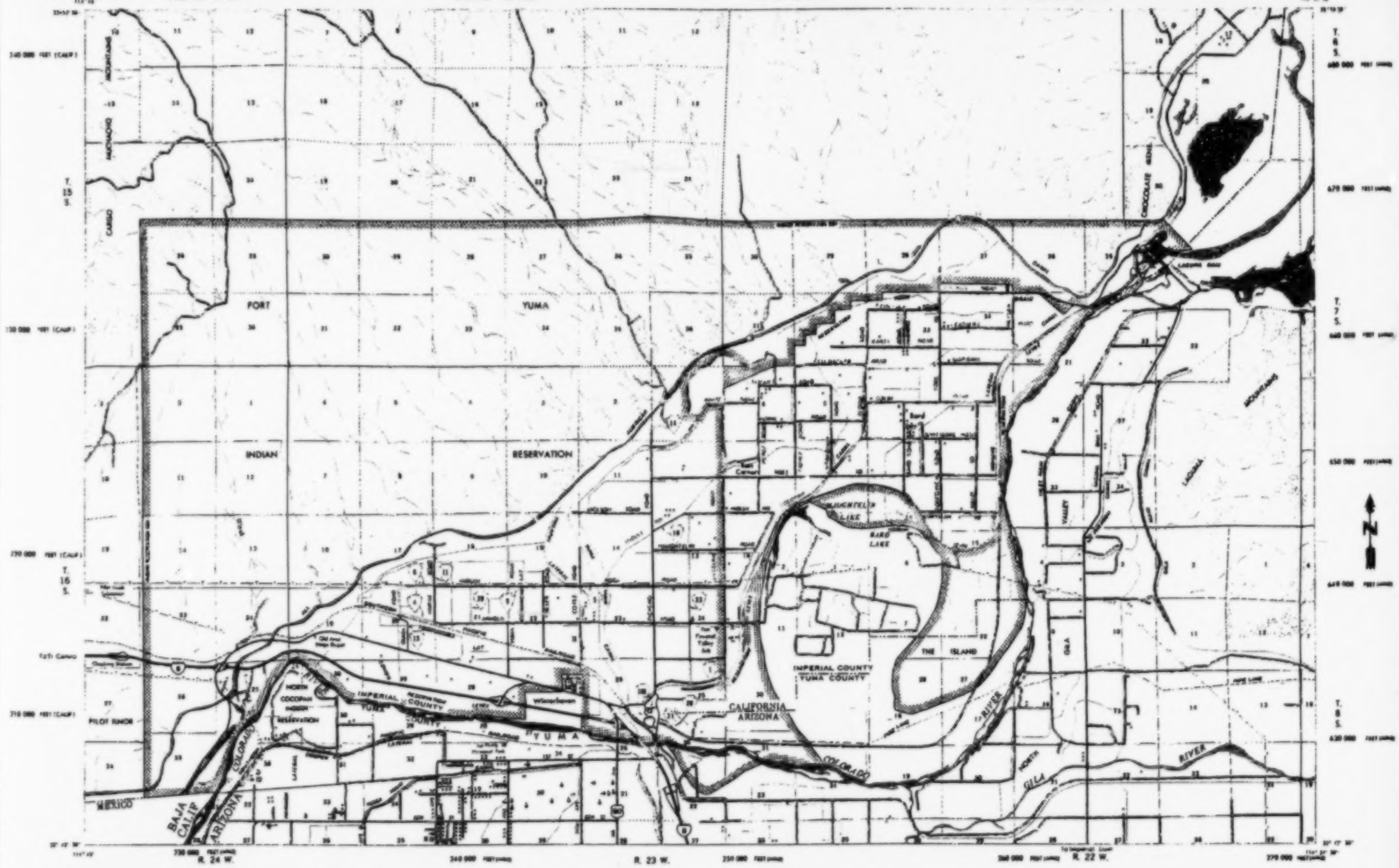
* * * *

APPENDIX D — LOCATOR MAP 1

BEST AVAILABLE COPY



APPENDIX E — LOCATOR MAP 2



Fort Yuma Reservation
QUECHAN INDIAN TRIBE

Locator Map 2

FORT YUMA INDIAN RESERVATION
IMPERIAL COUNTY, CALIFORNIA & YUMA COUNTY, ARIZONA

KEY TO SHEETS

FORT YUMA INDIAN AGENCY, CALIFORNIA
U.S. DEPARTMENT OF THE INTERIOR

Revised 1991
1981

MOTION FILED
DEC 20 1999

(14)

Supreme Court, U.S.
FILED
DEC 20 1999
OFFICE OF THE CLERK

No. 8, Original

In The

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WEST BANK HOMEOWNERS ASSOCIATION

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December 18, 1999

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MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The West Bank Homeowners Association (hereafter "Association") is an unincorporated organization representing approximately 650 families who live on a full or part time basis along a 17 mile stretch of the bank of the Colorado River in California in the area described as the "disputed lands" throughout the proceedings before the Special Master to determine the western boundary of the Colorado River Indian Reservation (hereafter "Reservation").

The Association and its members are deeply concerned about the legal ramifications of the proposed stipulation and agreement dated March 4, 1999 (hereafter "stipulation") in that it (1) violates the Act of Congress dated April 30, 1964, Public Law 88-302, 78 Stat. 188, (hereafter "1964 Act") that specifically prohibits the Secretary of Interior from exercising any authority whatsoever on behalf of the Reservation in the disputed area until " . . . determined to be within the reservation." *Id.* at section 5; (2) does not satisfy the requirements of the Court's previous holdings throughout the entire series of *Arizona v. California* decisions; (3) does not comply with the Court's order reopening an earlier decree; and (4) ignores the findings of fact, the conclusions of law and the boundary determination by this Special Master, which involved nine years of extensive litigation and included a thorough trial on the merits.

The Association's brief *amicus curiae* examines foundational legal issues and other relevant matters which the stipulating parties prefer to avoid further scrutiny thereof by this Court by way of a settlement agreement. Indeed, Special Master McGarr expressed his dissatisfaction with this outcome because it " . . . does not totally satisfy the concerns of the Special Master that the settlement does not fully address the issue referred to him." *Report and Recommendation of the Special Master*, July 28, 1999, at page 11 (hereafter "McGarr Report").

Additionally, the Association's brief details the magnitude of the consequences of closing this case without a boundary resolution and states several reasons why a final boundary determination must be made. As an example, in the United States Claims Court case *Colorado River Indian Tribes v. The United States* (Docket No. 699-88L) (hereafter "Claims Court case"), in which the Colorado River Indian Tribes (hereafter "Tribes") seek to recover damages from the United States for its supposed mismanagement of the Tribes' land in the disputed area, the parties convinced the judge to stay the matter for the last ten years until a final boundary determination is made in this proceeding.

Furthermore, there is no equitable or practical reason why the Special Master's determinations should be rendered nugatory and thereby relegated to the status of a mere footnote in this never ending litigious quagmire. California's insistence on reserving the right to challenge the boundary again at some unspecified time in the future, even though it prevailed at trial, illustrates just

how climacteric and substantial this controversy is and weighs heavily in favor of finally determining the boundary in this forum.

Although the United States and the Tribes are cooperating with each other to avoid further review of the boundary issue by this Court, the Tribes have exercised full authority in the disputed area with the concurrence and assistance of the United States since the issuance of the infamous *ex-parte* secretarial order on January 17, 1969 (hereafter "secretarial order"). Solely on the basis of an administrative order tainted by a governmental object of self-relief, quiet title actions were instituted in the United States District Court for the Central District of California[1] against those persons whose fee title originated from land patents granted by the state of California. None of the defendants could afford a protracted legal battle against the United States and the Tribes, and as a result there was no trial on the merits of the secretarial order in those cases. Other occupants who had been paying rent to the Bureau of Land Management were suddenly at the mercy of the Tribes. The Bureau of Indian Affairs claims unfettered authority on behalf of the Tribes and it has terminated the occupation permits of at least one hundred and ten of the Association's members. *West Bank Homeowners Association v. Acting Phoenix Area Director, Bureau of Indian Affairs*, Interior Board of Indian Appeals, Docket No. IBIA 97-8-A.

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[1] The opinions are unpublished.

The United States and the Tribes have established by administrative fiat what it has been unable to achieve elsewhere – a boundary *de facto*. The proposed stipulation is a last desperate attempt to preserve their purported authority over the disputed lands which they assert is derived from the secretarial order. A previous attempt before Special Master McGarr was unequivocally and soundly dismissed in his Memorandum Opinion and Order No. 4 at page 13 (September 6, 1991) wherein he stated:

> More compelling is the reading of what the Supreme Court intended in its reference in this case as it granted the State parties' motion to reopen the case. The court at that time had before it a history of lengthy litigation which had produced little by way of resolution of issues. Largely as a result of the court's piecemeal limitation of earlier Special Master's jurisdiction, there had been produced a situation which had not only failed to provide any simplification of the case, but had created a litigious marathon which promised to be interminable. (Hereafter, all Memorandum Opinion and Orders of Special Master McGarr are referred to as "Order No. ___").

The effort of the United States and the Tribes to put off the day of reckoning on this dispute, which has seen the appointment of four Special Masters over the last forty-two years, should be rejected. Indeed, the manifest weight of not only the evidence and the law, but also the equities, the practicabilities and the notion of judicial

economy dictate the Special Master's memorandum opinions and orders should be immediately reviewed and decided upon by the Supreme Court thereby bringing closure to the central issue in this matter.

The Colorado River Indian Tribes, the United States, the State of California, the Metropolitan Water District of Southern California and the Coachella Valley Water District (hereafter referred to jointly as the "stipulating parties" or "settling parties") have withheld consent for the filing of the Association's brief.

WHEREFORE, the West Bank Homeowners Association, individually and collectively, and as members of the general public, hereby respectfully moves the Court under Rule 37 to grant this Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE WEST BANK HOMEOWNERS ASSOCIATION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

President Grant issued the Executive Order of May 15, 1876, describing that portion of the western boundary of the Reservation that is the central issue in this case. For ninety-three years thereafter every federal agency, including the Bureau of Indian Affairs, treated the Colorado River's west bank, where the water meets the land, as the western boundary. In 1969 Secretary of Interior Udall issued the infamous *ex-parte* secretarial order purporting to establish a different boundary considerably west of the water's western edge. The United States and the Tribes have since steadfastly asserted that the area taken in by the secretarial order, known as the "disputed lands", is held in trust for the benefit of the Tribes.

The members of the Association[2] occupy lands in the disputed area and many resided thereon long before the boundary claim was raised by the Tribes. They have invested substantial monies and labor in improving the properties and a large percentage of the members are retired and living on fixed incomes and these homes are their only residences.

In August 1994, the Association filed a motion for leave to intervene in this case after the trial on the merits

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[2] This motion and brief were wholly authored by counsel for the Association and no person or entity, other than the *amicus curiae*, has made any monetary contribution in preparation thereof.

due to concerns the Special Master's boundary determination might fall victim to lengthy settlement discussions or be negotiated into oblivion. That is exactly what has occurred. The Master denied the motion on several grounds, including:

> Third, the Association has not shown that its interest in the boundary's location will not be adequately protected by the existing parties. In fact, the Association does not even argue that its interest in the boundary location is not adequately represented by the existing parties. The reason seems plain: At the 1993 hearing, the State Parties advocated the Association's position and won. The Special Master's ruling excludes the Association's land from the Reservation, and the State Parties continue to represent the Association's interest actively by arguing that the boundary should be moved further east. Order No. 17, March 29, 1995 at 6, 7.

Indeed, the Master ruled in Order No. 14 (September 20, 1993) that the Executive Order of 1876 established the western boundary of the Reservation as a riparian boundary. His detailed findings of fact and conclusions of law reveal the fixed line theory espoused by the United States and the Tribes in support of the secretarial order had no merit whatsoever and was categorically rejected. This opinion comports with the ninety-three year historical treatment of the boundary location by all federal agencies.

The members of the Association have a substantial interest in this matter. As occupants of the disputed area, their experience with the Tribes has proven they have

little if no rights whatsoever against a sovereign nation even when there has been no final boundary determination in favor of the Tribes as specifically required by Congress before tribal authority can exist. 78 Stat. 188, Sec. 5. Realistically, any rights they may have can only be protected if they are independently wealthy, have the intestinal fortitude to get involved in litigation against two sovereign nations and live long enough to see a conclusion.

As taxpayers who have undoubtedly contributed a portion of the United States' and California's legal expenses, they are concerned that despite nearly a half century of litigation the concept of finality is foreign to these proceedings and the costs keep mounting. They also wonder how much money the taxpayer will be forced to shell out in the Tribes' Claims Court case against the United States for lands, the overwhelming weight of evidence and authority clearly dictates, is outside the reservation. Lastly, as members of the general public, they are concerned about how the Secretary of Interior can arbitrarily and capriciously enlarge the boundary of a reservation without the approval of Congress.

SUMMARY OF ARGUMENT

The proposed stipulation (1) violates the Act of Congress dated April 30, 1964, Public Law 88-302, 78 Stat. 188, that specifically prohibits the Secretary of Interior from exercising any authority on behalf of the Reservation in the disputed area until a final boundary determination is made; (2) does not satisfy the requirements of the Court's earlier rulings throughout the entire series of the *Arizona v. California* cases; (3) is not in compliance with the Court's unambiguous Order reopening an earlier decree; and (4) will close this matter without a boundary determination resulting in a myriad of unconscionable consequences.

ARGUMENT

I.

THE UNITED STATES AND THE COLORADO RIVER INDIAN TRIBES ARE WITHOUT AUTHORITY TO ENTER INTO THE PROPOSED STIPULATION AND AGREEMENT

The Act of Congress dated April 30, 1964, Public Law 88-302, 78 Stat. 188, fixed the beneficial ownership of real property interests of the Reservation in the Tribes. However, Congress expressly denied reservation status for the disputed lands and the Secretary of Interior's appurtenant authority until the boundary was determined:

> *Provided, however,* That the authorization herein granted to the Secretary of the Interior shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation: *Provided further,* That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation." 78 Stat. 188, Sec. 5.

Regardless of how the settling parties characterize the proposed stipulation, it is the result of and is inextricably fused with the *res* of this case – the United States' and the Tribes' assertion of a boundary claim that encompasses the disputed lands. Under the detailed description of the Reservation's limits in Section 5 above, unless and until there is a boundary determination locating those

lands within the reservation, the authority of the Secretary of Interior and the Tribes terminates at the westerly edge of the present course of the Colorado River. There is no ambiguity in this congressional mandate.

Furthermore, any assertion that the secretarial order satisfies the final determination requirement is wholly without merit. The Supreme Court previously ruled that the Secretary's Order was not a binding determination of the boundary issue stating: " . . . we in no way intended that *ex-parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies or private water users holding priority rights." *Arizona v. California*, 460 U.S. 605, 636 (1983).

Despite the Court's rejection of this argument thirteen years earlier, the United States and the Tribes continued to assert the supremacy of the secretarial order before Special Master McGarr. The Master ruled on January 18, 1996: "The Tribes and United States rely heavily on an Order issued by the Secretary of the Interior on January 17, 1969 which is based on an opinion from the Solicitor of the Department of the Interior issued that same day . . . [T]he reasoning underlying the Secretary's Order is not sound. It misinterprets the definition of bank and the nature of accretions. Moreover, the Secretary's conclusion that the 1876 Order created a fixed boundary is directly contrary to the 1876 Order's intent to create a riparian boundary." Order No. 19 at 16-18.

Additionally, the Master refuted the claim of the United States and the Tribes that the 1964 Act implicitly authorized the Secretary to determine the Reservation

boundary: "The Tribes' argument that the 1964 Act implicitly authorized the Secretary to determine the Reservation's boundary is unfounded. . . . To the contrary, the 1964 Act states, "the authorization granted herein . . . shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation . . . In light of this explicit statement, it is clear that the 1964 Act did not authorize the Secretary to resolve the boundary dispute." Order No. 19 at 17, 18.

The most probative evidence of congressional intent is the statutory language itself. The presumption that the proposed stipulation falls within the purview of what Congress intended is insurmountable. It follows *a fortiori* from this conclusion that the United States and the Tribes have no authority to enter into the proposed stipulation and agreement.

II.

THE PROPOSED STIPULATION AND AGREEMENT DOES NOT SATISFY THE REQUIREMENTS OF THE COURT'S PREVIOUS RULINGS

The answer to the question of how to ensure a high degree of finality and certainty to all Lower Basin interests in the allocation of Colorado River water was first proposed by Special Master Rifkind and was adopted by the Court in 1963, *Arizona v. California*, 373 U.S. 546 at 600-601:

> "[T]he most feasible decree that could be adopted in this case . . . would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation.
>
> . . . This will preserve the full extent of the water rights created by the United States and will establish rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." Rifkind Report at 265.

The Reservation boundary dispute was tried before Special Master Rifkind, who rejected the United States' boundary claim and adopted the California position. The Court found it "unnecessary to resolve those [boundary] disputes here", 373 U.S. at 601, but the Court's 1964 Decree did not award any water rights to lands which Special Master Rifkind did not find to be within the reservation. More importantly, the Decree provided for "appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective

reservations are finally determined." *Arizona v. California*, 376 U.S. 340 at 344 (1964) (hereafter "1964 Decree").

The Court re-affirmed the requirement of granting additional water rights for the Reservation only for lands found to be located therein in its 1979 Supplemental Decree:

> "[T]he quantities [of water] fixed in [the 1964 decree sections setting forth the water rights of each of the five Tribes] shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event the boundaries are finally determined." *Arizona v.* California, 439 U.S. 419 (1979) at 421.

The Court thoroughly stated this requirement again in its 1983 decision:

> It must be remembered that while we did not accept Master Rifkind's boundary decisions, water allocations to the Tribes under our decree were limited to the irrigable lands within the reservation boundaries as the Master had determined them to be. . . . The United States . . . might have instituted appropriate judicial proceedings in the District Courts, in which event the issues tried by the Special Master would presumably have been relitigated. Instead, the Secretary chose to bring matters to a head by a series of secretarial orders, culminating with the 1978 motion in this Court moving for a determination of the irrigable acreage within the boundary lands recognized by the Secretary of Interior, and for appropriate additional water allocations. . . . Because of our disposition of the above issues, it is not necessary to resolve the other exceptions brought by

> the States and state agencies pertaining to the amount of irrigable acreage within the so-called omitted lands or within the boundaries that we have not recognized as finally determined at this time. *Arizona v. California,* 460 U.S. 605 (1983) at 637, 638, 641.

Special Master McGarr also acknowledged the link between lands and ancillary water rights stating "It is true that boundaries determine acreage and acreage determines water rights . . . " (McGarr Report at 11).

The long held view of this Court clearly demands a boundary determination to allocate further water rights to the Reservation. The stipulation intentionally avoids this requirement. There is no legal reason for the Court to stray from its well entrenched pre-requisite and surrender to the proposed stipulation merely to satisfy the goals of the settling parties, who apparently prefer to prolong this boundary dispute *ad infinitum*.

III.

THE PROPOSED STIPULATION AND AGREEMENT DOES NOT COMPLY WITH THE COURT'S ORDER REOPENING THE 1964 DECREE

On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree for the following purposes:[3]

> [in] order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations. . . . Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims.

The United States and the Tribes did not oppose the State Parties' motion and on October 10, 1989 the Court issued the following order (493 U.S. 886):

> The motion of the State Parties to reopen decree to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Reservations is granted. Justice Marshall took no part in the consideration of this motion.

---

[3] Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims With Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations 1-2 (July 19, 1989).

Despite the crystal clear language of the Court's order, the United States and the Tribes continued to resist a final boundary determination before the Special Master. They attempted to limit the Master's jurisdiction with the claim that only the northern portion of the boundary was justiciable because the Secretary of Interior's final determination of the lower one third of the western boundary had not been made.

Special Master McGarr's Order No. 4 is determinative of this issue. Therein the Master addressed the question of whether the Supreme Court intended the final determination of the entire western boundary. He pointed out that in the 1964 Decree this Court reserved the boundary issue for future determination. Order No. 4 at 11. He also states:

> An examination of the pleadings supports the State parties' contention that the court finally intended to resolve all boundary issues as a basis for the determination of all consequent water rights issues. . . . It is the determination of the Special Master that the entire boundary dispute has been referred, and . . . this boundary determination is to create a basis for the allocation of water rights to the claimants in this case. Order No. 4 at 13, 14.

The Special Master later stated "[b]y agreement of the parties, the sole issue to be resolved is the meaning of the Executive Order of 1876 and whether the disputed portion of that order establishing the western boundary of the Colorado River Indian Reservation intended the boundary to be a fixed line or a riparian boundary." Order No. 14 at 1.

The proposed stipulation and agreement disregards the order of the Court and the Special Master's determinations of the intent of that order. The Court would be remiss in approving a stipulation and agreement that is purposefully and contemptuously prescribed to ignore the unambiguous terms of its' order.

IV.

THERE ARE FAR REACHING AND INTERMINABLE CONSEQUENCES IN NOT RESOLVING THE BOUNDARY DISPUTE

The settling parties have presented to this Court a joint memorandum in support of the proposed stipulation and agreement that grotesquely understates what transpired before Special Master McGarr. The totality of several years of litigation with a trial on the merits over the boundary location is reduced to the revelation that "In the course of addressing the issue of water rights for the disputed lands before the Special Master, the parties have discussed questions relating to the proper location of the Colorado River Indian Reservation . . . western boundary (which in turn raises issues of the extent of tribal, federal, and state jurisdiction over the disputed lands) and the ownership of the west half or the bed of the Colorado River, as well as a host of other issues." Joint memorandum at 2. This cavalier summation of the proceedings is as weak as this dispute is boundless.

In the terms of the stipulation itself lie the seeds of the next "round" of litigation between the settling parties:

> "The United States and the Tribes, but not the other parties to this Stipulation and Agreement, agree that the lands described in the 1969 Secretarial Order, are included within the Reservation . . . The State of California disagrees, and expressly reserves the right to challenge the validity, correctness and propriety of the 1969 Secretarial Order." Stipulation at 4.

To quote Justice Brennan: "As this litigation now stands, the considerations of finality are not so strong, nor the interests of justice so weak, as the Court would have them. . . . The Court . . . guarantees that the original jurisdiction litigation over Lower Basin States' water rights will proceed to another 'round', and possibly still more 'rounds' thereafter, as one-by-one the border questions are settled by litigation." 460 U.S. 605 at 643, 657 (Justice Brennan concurring in part, dissenting in part). The last sixteen years have borne out Justice Brennan's prophecy.

The Claims Court case filed by the Tribes in 1988 concerning lands in the disputed area has been stayed pending this tribunal's decision herein. Counsel for the Tribes succinctly described the dilemma the United States has created for itself when he told the Claims Court judge during a status hearing: "To be candid, I think the tribes are concerned about putting the United States in a position where it might in this case be denying liability because of the ownership status of the land, while at the same time in *Arizona v. California* it's claiming the land is held in trust for the benefit of the tribes." Claims Court, April 28, 1995 status hearing transcript at 4.

If the Court approves the stipulation, the United States and the Tribes will in the future assert the proceedings herein did not affect the 1969 secretarial determination of the boundary. The citizens of the United States will unfairly pay damages to the Tribes in the Claims Court matter and the Secretary of Interior will continue exercising authority on behalf of the Tribes over lands outside the Reservation boundary in direct violation of

the 1964 Act of Congress. Also, as Justice Brennan predicted, the settling parties will be allowed to dance this fandango again.

The financial costs to the public and the incalculable number of hours the courts and federal agencies and all the personnel involved will be forced to commit, as a result of the Pandora's box the United States has opened, is an unconscionable waste of this country's resources.

CONCLUSION

The long, tortured history of this case has produced only one document to support the claims of the United States and the Tribes – the *ex-parte* secretarial order. The United States' issuance of that order attempting to redefine the Reservation boundary as established in the Executive Order of May 15, 1876 greatly exacerbated this dispute. The language of the Executive Order pertinent here establishes the western boundary of the Reservation as a direct line from the top of Riverside Mountain to the west bank of the Colorado River " . . . thence down said west bank to a point opposite the place of beginning . . . "

The Special Master concluded after a thorough trial:

> . . . [T]he earlier position of the United States and the Tribes in the *Aranson* case [*U.S. v. Aranson*, 696 F.2d 654 (9th Cir.) *cert. denied* 464 U.S. 982 (1983)] is a factor which has evidentiary weight in the determination of the issue herein. In the *Aranson* case the Government and the Tribes unequivocally urged upon the Court the position that the Colorado River was the moving boundary of the reservation, and that contention has relevance here.
>
> It is further evident that despite some resourceful arguments to the contrary, the phrase "west bank" meant in 1876 what it means today; that is that line formed where the water meets the land. . . . Judgment on this issue must be for the State Parties. There is no ambiguity in the Order of 1876 in its call to the "west bank of the Colorado River." The boundary thus described is where the water and the land meet, subject, as it must be, to the rules of erosion, accretion and avulsion.

> The Executive Order of 1876, which is controlling in this dispute, established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not as a fixed line. Order No. 14 at 3, 9, 10, 19.

Congress, this Court, the State Parties, the United States, the Tribes and the Claims Court have all either mandated, intended, ordered, requested, agreed to, stipulated to or is otherwise awaiting a final determination of the Reservation boundary in this forum. A final judgement marks a formal point at which considerations of judicial economy, certainty, reliance, comity and justice itself take on strength. **THEREFORE**, the Special Master's Orders should be immediately reviewed and the boundary issue decided upon by this Court.

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STATE OF ARIZONA,

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v.

STATE OF CALIFORNIA, ET AL.

On Exceptions To The Report Of The Special Master

OBJECTION OF THE STATE OF CALIFORNIA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE COACHELLA VALLEY WATER DISTRICT AND THE COLORADO RIVER INDIAN TRIBES TO THE MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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The State of California, The Metropolitan Water District of Southern California, the Coachella Valley Water District and the Colorado River Indian Tribes respectfully object to the *Motion of the West Bank Homeowners Association for Leave to File Brief Amicus Curiae* (Dec. 20, 1999) ("Association's Motion") because the proposed brief does not "bring[ ] to the attention of the Court relevant matter. . . . " SUP. CT. R. 37.1. Having previously been denied permission to intervene in this case, *Order* (Apr. 24, 1995), the West Bank Homeowners Association ("Association") now seeks to file an amicus brief to oppose the portion of the Special Master's Report recommending approval of the parties' proposed settlement to finally resolve the water rights claims related to the Colorado River Indian Reservation. *See Report and Recommendation of Special Master Frank J. McGarr* at 14 (July 28, 1999) ("Master's Report") (The Master recommends approval of the Colorado River settlement because it "would equitably resolve the water rights disputes. . . . "). The Association has no interest in the water rights at stake in this case. *See Memorandum Opinion and Order No. 17* at 2 (Special Master, Mar. 29, 1995) ("Order No. 17") ("The Association does not own land in the disputed area and makes no claim to title or water rights."). Instead, the Association, whose members are current or former lessees of the United States, asks this Court to broaden the present litigation to include its quarrel with the United States' administrative treatment of land which the federal government unquestionably owns. In seeking to interject the

question of the administrative treatment of federal land into this interstate water adjudication, the Association fails to satisfy the requirement of SUP. CT. R. 37.1 that amicus briefs contain relevant matter. The grounds for this objection are further explained below.

1. This case is a water rights case and the Court repeatedly has advised that it would not broaden its scope to include the multitude of issues that might be related to the determination of the water rights claims of the tribes. *See Arizona v. California*, 373 U.S. 546, 601 (1963) ("We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation."); 460 U.S. 605, 638 (1983) ("It is clear enough to us and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that if at all possible, the boundary disputes would be settled in other forums."). As the Special Master and the affected parties have concluded, the proposed settlement for the Colorado River Indian Reservation ("Reservation") finally resolves the water rights issue associated with the boundary dispute for the Reservation. Master's Report at 10-14. The *Brief Amicus Curiae of the West Bank Homeowners Association* (Dec. 18, 1999) contains no support for its conclusory accusation that the proposed settlement will fail to bring complete closure to the tribal water rights claims related to the disputed boundary of the Reservation. Rather, the proposed settlement responds fully to the initial request of the State Parties to reopen the decree in this case "to finally establish the water rights entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users. . . . " *Motion of*

State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations at 2 (July 19, 1989). *See also Order*, 493 U.S. 886 (Oct. 10, 1989) (reopening decree to determine "disputed boundary **claims**" (emphasis added)).

2. At great risk to the litigating parties on either side who are satisfied with the proposed settlement of the disputed tribal water rights, the Association asks the Court to set aside the accord reached among the parties on the issue before the Court in order to adjudicate matters that are not necessary to the resolution of that issue. To be sure, the proposed settlement resolves only the water rights issue that is the subject of this case and not every dispute that might subsequently arise among the parties in connection with the boundary of the Colorado River Indian Reservation. Indeed, the parties worked hard to ensure that any potential conflict outside of this water rights determination would not be prejudiced by the settlement of their dispute over the tribal water rights. Those same protections also ensure that the interests of the Association are not improperly influenced by the resolution of the water rights dispute between the parties.

3. The Association reaches far beyond the record in this case to present a highly skewed picture of the matters that it argues support its position. Because its intervention was denied, many of the contentions which the Association now makes have not been tested for accuracy in any adversary setting. It is beyond the scope of this response to address each of those faulty assertions in detail. In short, the Association's brief raises a variety of

complex and highly disputed matters – unscreened by the Master – that have no bearing on the issue of the extent of the water rights to which the Colorado River Indian Tribes are entitled. With no record before the Master on many of these events, sorting out the true picture promises to be a burdensome task.

For the reasons described above, the additional matters which the Association seeks to present to the Court in its proposed amicus brief are not relevant to the issue before the Court. Accordingly, the Association's Motion should be denied.

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STATE OF CALIFORNIA, ET AL.

On Exceptions To The Report Of The Special Master

REPLY OF THE COLORADO RIVER INDIAN TRIBES TO THE PROPOSED BRIEF *AMICUS CURIAE* OF THE WEST BANK HOMEOWNERS ASSOCIATION

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I. INTRODUCTION

The State of California, The Metropolitan Water District of Southern California, the Coachella Valley Water District, the United States and the Colorado River Indian Tribes ("Tribes") (collectively "the settling parties") executed the Stipulation and Agreement (Mar. 4, 1999) (Attachment 4 to *Report and Recommendation of Special Master Frank J. McGarr* (July 28, 1999) ("McGarr Report")) to resolve the longstanding dispute over the extent of the water rights for use on the Colorado River Indian Reservation ("Reservation"). The Stipulation and Agreement was subsequently approved by the Special Master who recommended its approval to the Court. McGarr Report at 13-14. Although all of the affected parties to this case continue to strongly support the proposed settlement, the West Bank Homeowners Association ("Association"), whose members lease land from the United States, seeks leave to file a brief amicus curiae to oppose the accord reached by the litigants. *Motion of the West Bank Homeowners Association For Leave to File Brief Amicus Curiae* (dated Dec. 18, 1999, filed Dec. 20, 1999) ("Association's motion"). The Association previously sought unsuccessfully to intervene in the case.

The settling parties have jointly objected to the filing of the Association's proposed brief on the grounds that the proposed brief does not contain relevant matter because it seeks to interject into this interstate water rights adjudication the issue of the United States' administrative treatment of lands which the federal government indisputably owns. *Objection of the State of California, The Metropolitan Water District of Southern California, the Coachella Valley Water District and the Colorado River Indian*

Tribes to the Motion of the West Bank Homeowners Association For Leave to File Brief Amicus Curiae Objection of the State of Arizona (filed Jan. 18, 2000 dated Jan. 19, 2000). This brief responds to the Association's proposed brief in the event that the Court allows the Association to file its pleading.

II. STATEMENT

The lengthy history of the *Arizona v. California* litigation is described in the *Brief for the United States in Support of Exception* at 2-12 (Dec. 20, 1999) ("Brief for the United States"). The flaws in the arguments advanced in the *Brief Amicus Curiae of the West Bank Homeowners Association* (dated Dec. 18, 1999, filed Dec. 20, 1999) ("Association's brief"), however, require further explanation of (1) the history of the dispute over the water rights associated with the land affected by the disputed boundary of the Reservation; (2) the proposed settlement of that long-standing controversy; and (3) the circumstances regarding the management of the area in question.

A. THE CONTROVERSY OVER THE WATER RIGHTS FOR THE WEST BANK LANDS OF THE COLORADO RIVER INDIAN RESERVATION.

1. The History of this Case Regarding the Disputed Boundary of the Colorado River Indian Reservation.

The controversy over the proper location of a portion of the western boundary of the Reservation and the effect of the boundary's location on the water rights for the Tribes have plagued this water rights litigation from the outset. The so-called boundary dispute centers primarily

on certain federal lands currently treated as part of the Reservation. Those lands are shown on the map which is Attachment 1. Other lands south of that area also have been the subject of concern, and the State of California, certain private parties, the United States and the Tribes have brought suit to determine the effect of the movement of the Colorado River on their competing claims to title. *See* Attachment 2 (showing the location of the Reservation and identifying the lands in question commonly called the Ninth Avenue and Olive Lake areas). As all of the parties and the Court have long recognized, the quantity of water rights to which the Tribes are entitled is affected by whether those lands are a part of the Reservation. *See, e.g., Supplemental Decree, Arizona v. California*, 439 U.S. 419, 421 (1979) ("Supplemental Decree").

In the first phase of this case, Special Master Rifkind sought to determine the location of the disputed portion of the western boundary of the Reservation. The first issue which he addressed was whether the boundary was fixed at the time of the pertinent executive order or whether it moved as the river moved. *Report of Simon Rifkind, Special Master* at 274-78 (Dec. 5, 1960). The Master found that the boundary was ambulatory but that in certain locations it had been fixed by the avulsive movement of the river. *Id.* The Court subsequently determined that the Master should not have entered the fray over the proper location of the boundary, stating that it "disagree[d] with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation." *Arizona v. California*, 373 U.S. 546, 601 (1963). Nevertheless, the Court recognized water rights for the Tribes that

were consistent with the Master's findings, both for the northern part of the disputed area and in the two southern areas where the Master found that the river had moved by avulsion thereby fixing the boundary. The Court's subsequent decree provided for an adjustment of the rights decreed for the Reservation in the event "that the boundaries of the respective reservations are finally determined." *Arizona v. California*, 376 U.S. 340, 345 (1964) ("1964 Decree").

In 1969, the Secretary of the Interior sought to resolve a portion of the boundary dispute for the Colorado River Indian Reservation. On the basis of an opinion by the Solicitor of the Department, the Secretary issued an order determining that for the northern portion of the disputed area, the effect of California Civil Code § 830 was to fix the boundary where it was located in 1876 and that the accretions to the western bank as the river moved eastward were a part of the Reservation. *Western Boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, Cal., through Section 12, T. 5 S., R 23 E., S.B.M. Cal.*, No. 90-1-5-668 (Dept. of Interior Jan. 17, 1969) ("1969 Secretarial Order"). In the southern portion of the disputed area, the issue of title to one of the areas affected by the movement of the river was addressed in *United States v. Aranson*, 696 F.2d 654 (9th Cir.), *cert. denied sub nom. Colorado River Indian Tribes v. Aranson*, 464 U.S. 982 (1983). On remand from the Court of Appeals for the Ninth Circuit, the parties to the *Aranson* litigation settled. *Settlement Agreement* (Jan. 22, 1990).

The question of whether the Tribes were entitled to additional water rights for the land declared to be part of the Reservation by the 1969 Secretarial Order was

addressed in the second phase of this case when in 1978 the United States and the Tribes invoked the 1964 Decree to seek additional water rights for the land at issue. The Court ultimately refused to award water rights for those lands, stating: "It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums." *Arizona v. California*, 460 U.S. 605, 638 (1983) ("*Arizona v. California II*"). The Court stressed that it never intended that decisions by the Secretary could adversely affect the States or private water users without an opportunity for those parties to challenge the decision by the Secretary in Court. *Id.* at 636-40. Following the Court's decision, the provisions of the 1964 Decree and the 1979 Supplemental Decree, governing the modification of tribal rights in the event the boundaries were determined, were left intact. *Compare Arizona v. California*, 466 U.S. 144, 145 (1984) *with* 1964 Decree, 376 U.S. at 345 *and* Supplemental Decree, 439 U.S. at 421.

Concurrent with the proceedings before the Court in *Arizona v. California II*, the State parties sought to challenge the administrative decisions affecting the Colorado River, the Fort Mojave and the Fort Yuma Indian Reservations in the United States District Court for the Southern District of California. 460 U.S. at 638-39. In *Metropolitan Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit found that there was no jurisdiction for the challenge and this Court affirmed that holding by an equally divided Court. *California v. United States*, 490 U.S. 920 (1989).

2. The Present Proceedings.

Thereafter, the State parties filed their motion in this Court to once again reopen the 1964 Decree "to finally establish the water rights entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users. . . . " *Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations* at 2 (July 19, 1989). The United States agreed, but carefully worded the issue it thought should be addressed:

> The State parties' motion should be granted insofar as it requests this Court (1) to fix the disputed boundaries of the Fort Mojave, Colorado River, and Fort Yuma Reservations for purposes of determining whether the United States reserved water for those Reservations in addition to that awarded in the Decree and Supplemental Decree, and (2) to determine the amount and priority of any further water rights reserved by the United States.

Response of the United States at 7 (Sept. 1, 1989). In agreeing with the need to determine the extent to which the Colorado River Indian Tribes, the Fort Mojave Indian Tribe and the Quechan Tribe of the Fort Yuma Indian Reservation (collectively "the three tribes") were entitled to additional water rights for the lands at issue, the three tribes pointed out that while it was entirely appropriate to adjudicate their entitlement to additional water rights, that litigation would not and could not resolve the distinct issues of the proper location of the reservation boundaries and the title to the land in question since

those questions were not properly before the Court. *See Response of the Tribes to the Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations* at 4-5 (Sept. 1, 1989). This Court's order "reopen[ed the] decree to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations." *Order*, 493 U.S. 886 (Oct. 10, 1989).

The issues raised before Special Master McGarr with regard to the Colorado River Indian Reservation were complex. The Master first determined that he would examine the water rights with regard to the entire length of the disputed portion of the western boundary, rejecting the Tribes' contention that the only area subject to review in these proceedings was that governed by the 1969 Secretarial Order. *Memorandum Opinion and Order No. 4* at 13-14 (Sept. 6, 1991) ("[T]his boundary determination is to create a basis for the allocation of water rights to the claimants in this case."). The Master also refused to order the joinder of those entities who claimed title to the lands in the southern part of the disputed area which was not covered by the 1969 Secretarial Order and where the determination of the boundary in favor of the Tribes would affect the interests of landowners in the area. *Memorandum Opinion and Order No. 8* (Sept. 21, 1992).

Following an evidentiary hearing, the Master determined that the intent of the controlling Executive Order of May 15, 1876 was to establish a riparian boundary that moved with the river subject to the usual rules of accretion and avulsion. *Memorandum Opinion, Report and Order No. 14* (Sept. 20, 1993). He subsequently rejected the

argument of the Tribes and the United States that the effect of California Civil Code § 830 was to include within the Reservation a strip of land east of the ordinary high water mark on the west bank of the river so that when the river moved eastward, the resulting accretions belonged to the Tribes. *Memorandum Opinion and Order No. 18* (Sept. 28, 1995); *see also Memorandum Opinion and Order No. 19* (Jan. 18, 1996).

Not all of the Master's rulings were favorable to the State parties. He rejected their contention that the tribal allocations should be reduced to account for the judgment in *United States v. Aranson*. *Memorandum Opinion and Order No. 16* (Mar. 20, 1995).[1] He also refused to consider the contention by the State of California that it owned the west half of the bed of the Colorado River and that the Reservation could not encompass those lands. *Id.*

3. The Colorado River Indian Reservation Settlement.

With the road map of the likely outcome before the Master in hand, the parties turned their attention to settlement of the water rights dispute for the Reservation. The ultimate resolution, despite its current simplicity, was difficult to achieve, taking over four years to accomplish. Initially, the State of California and the Tribes sought to resolve a host of potential issues that might be affected by the outcome over the proper location of the

[1] The Master issued a separate *Order No. 16* on February 11, 1994 approving the pretrial order for phase II of the proceedings before him.

western boundary of the Reservation in the disputed area. Many of those issues, such as the question of ownership of the bed of the west half of the Colorado River, had been addressed in the course of the litigation over the extent of the tribal water rights. After a lengthy and determined effort to resolve those issues, the parties concluded that the only possibility for a settlement would be to limit the settlement to the question of whether the Tribes were entitled to additional water rights. The settlement approved by the Master is so limited:

> 1. The Tribes would obtain an additional 2,100 acre feet of water per year, subject to the same terms and conditions that apply to the Tribes' existing water rights. (¶ B). The Tribes would also agree not to claim any additional reserved water rights in California. The Tribes' existing rights would not be affected.
>
> 2. The settling parties reserved their respective positions with regard to the location of the Reservation boundary and title to the west half of the bed of the Colorado River. (¶¶ C, D).
>
> 3. The Master's opinions and reports were to have no precedential or preclusive effect among the parties. (¶ F).

McGarr Report at 9-10.

In the words of the Special Master, the settlement "resolves the water rights allocation issue which was at

the heart of the dispute between the parties." *Id.* at 10.[2] Although the Master expressed concern that the issue of the proper location of the boundary had not been resolved, he concluded that the "water rights allocation is a major achievement as to the central issue of water rights and should not be abandoned because peripheral issues remain." *Id.* at 13-14. The Master expressly acknowledged that the boundary dispute "cannot resurface in the future in the context of a tribal water rights claims, thus achieving the finality as to water rights which the Court's reference was seemingly intended to achieve." *Id.* at 13.

B. THE WEST BANK HOMEOWNERS ASSOCIATION.

1. The Association Consists of Tenants Who Seek to Challenge the United States' Administration of Federal Land.

The Association, according to its motion, is comprised of various individuals who live or have lived on the federal lands declared by the Secretary of the Interior to be a part of the Reservation in 1969. *See Arizona v. California II*, 460 U.S. at 631. The members of the Association do not claim title to the lands in question but instead, for undisclosed reasons, would prefer to attempt to lease

---

[2] The Special Master's recommendation that the settlement should be approved by the Court followed the Association's ex parte letter to the Special Master that objected to the proposed settlement on similar grounds to those which it raises in its proposed brief. *See* Letter to Frank J. McGarr from John Lindskog (June 18, 1999).

the lands on which they reside from the Bureau of Land Management rather than to continue to lease the lands through the Bureau of Indian Affairs. The Association and its members have steadfastly resisted the Tribes' and the Bureau of Indian Affairs' management of the federal lands on which they reside.

There is no dispute over the federal ownership of the land in question. As the Court noted in *Arizona v. California II*, following the issuance of the 1969 Secretarial Order, "the United States, on behalf of the Tribes, obtained final judgment in title disputes with private parties quieting title in the Tribes to various parcels in the area added to the reservation." 460 U.S. at 631. *See also id.* at 636 n.26. Through extensive litigation, the United States' ownership of the land in question was confirmed and there is no outstanding issue with regard to the federal title to the land. In some cases, the litigation brought by the United States merely involved squatters who had no claim to the land on which they resided. In other instances, complex factual and legal questions were raised concerning the movement of the Colorado River and its effect on adjacent land titles. Other cases involved the scope of federal grants to the State of California under various public land laws. Certain of the resulting judgments expressly provided that the land would be held in trust for the benefit of the Tribes. As the Court previously observed, all such disputes were ultimately resolved. Subsequently, the land has been consistently administered by the United States – the unquestioned owner – for the benefit of the Tribes.

Substantial portions of the lands in question have been leased to non-tribal members and the management of those areas has been extremely difficult. For example, in its motion, the Association refers to its unsuccessful administrative challenge to actions by the Bureau of Indian Affairs terminating the occupation permits of certain of its members. *See* Association's motion at iii. In *West Bank Homeowners Association v. Acting Phoenix Area Director, Bureau of Indian Affairs*, Dkt. No. IBIA 97-8-A (Interior Bd. of Indian Appeals Oct. 23, 1997), the Interior Board of Indian Appeals noted that the only administrative decision of record that was the subject of the appeal was the failure of one of the occupants to pay rent for the three preceding years. Although in this case the Association has not revealed its membership, it appears that virtually all of the individuals who disputed the termination of their leases and who apparently belong to the Association have refused to pay rent to the Bureau of Indian Affairs, despite having entered into leases with that agency and the Tribes.

The Tribes have questioned the United States' diligence in managing the land for the benefit of the Tribes. Thus, in *Colorado River Indian Tribes v. United States*, No. 699-88 L (Fed. Cls. filed 1988), the Tribes brought suit against the United States in the Court of Federal Claims, alleging the failure of the Bureau of Indian Affairs to collect rent for the use of a portion of land known as the Red Rooster Resort. That case has been stayed, in part to avoid a controversy of the sort that has arisen in this case in regard to the Fort Yuma Indian Reservation. *See, e.g.*, Brief for the United States at 18-32. In addition, the United States agreed during the stay to pursue damages

against the trespassing former lessees. That litigation resulted in the United States obtaining a consent judgment against the defendant William Booth directing him to pay $15,000 "to the United States as trustee for the Colorado River Indian Tribes." *Judgment, United States v. Burson*, CV 91-2410 RMT (C.D. Cal. filed Nov. 22, 1993). Although the judgment directed that the property be vacated, the United States has had to return to court repeatedly in its efforts to obtain compliance with the court order. *See, e.g., Order Re: Civil Contempt and Writ of Assistance, United States v. Burson*, CV 91-2410 RMT (C.D. Cal. filed Oct. 17, 1995).

2. The Association's Effort to Interject its Issues in These Proceedings.

The Association has doggedly sought to import its dissatisfaction with the United States' treatment of the federal land in question into this litigation. In 1995, the Court denied the Association's attempt to intervene in this case. *Order* (Apr. 24, 1995). In seeking to intervene, the Association raised many of the same points which it now wishes to present to the Court as amicus. The Master recognized that "[t]he Association does not own land in the disputed area and makes no claim to title or water rights." *Memorandum Opinion and Order No. 17* at 2 (Special Master, Mar. 29, 1995) ("Order No. 17"). With regard to the Association's argument about the authority of the Secretary to issue the 1969 Secretarial Order and to administer the lands in question for the benefit of the Tribes, the Master concluded that the argument would "not be impeded or impaired by the disposition of this

litigation." Order No. 17 at 4. The Master further stated that the Association's position had "no relation to the existing dispute between the original litigants, and the Special Master will not prejudice the existing parties and further delay this lengthy litigation to adjudicate new issues." *Id.* The Master recommended that the Court deny permissive intervention as well as intervention of right. *Id.* at 8. The Court accepted that recommendation.

III. ARGUMENT

A. THE PROPOSED SETTLEMENT WOULD FINALLY RESOLVE THE WATER RIGHTS ISSUES RELATED TO THE COLORADO RIVER INDIAN RESERVATION IN THIS INTERSTATE STREAM ADJUDICATION.

The proposed settlement will finally resolve every remaining controversy over the extent of the reserved water rights for use on the Colorado River Indian Reservation in the State of California. The language of the Stipulation and Agreement is unambiguous:

> The Tribes and/or the United States on behalf of the Tribes shall not claim or be entitled to any additional reserved water rights from the Colorado River for lands in the State of California other than those rights set forth in this Stipulation and Agreement and the prior decrees in *Arizona v. California*.

Stipulation and Agreement ¶ II(B)(4) (McGarr Report, Attachment 4). There is no confusion over that language. Once the settlement is implemented, the dispute over the water rights for the western boundary lands of the Reservation will be finally determined and the Tribes will be precluded from any effort to claim additional water rights under federal law for such lands.

The decree proposed by the settling parties and recommended by the Master confirms the finality of the proposed settlement. *See* McGarr Report, Attachment 6. The recommended decree would strike from the earlier decrees the provisions on which the parties have relied in their efforts to adjust the quantities of water to which the Tribes are entitled. First, the recommended decree would eliminate the critical provision of the 1964 Decree that was inserted to allow water rights adjustments once the boundaries were resolved. *Compare* McGarr Report, Attachment 6 ¶ B, *with* 1964 Decree, art. II(D)(5), 376 U.S. at 345. Second, the recommended decree clarifies that the provisions in the 1979 Supplemental Decree do not provide an independent ground to adjust the tribal water rights for the lands in question. *Compare* McGarr Report, Attachment 6 ¶ C, *with* 1979 Supplemental Decree, 439 U.S. at 421. The result would be a decree that is final as to the water rights for the Tribes' California lands and not open for further revision, no matter what happens with regard to the controversy over the precise location of the Reservation boundary. It would not matter whether more land or less land was finally determined to be a part of the Reservation – the tribal water rights would be as described in the proposed modified decree.

The Association's arguments fail to acknowledge that the proposed settlement finally resolves the extent of the Tribes' water rights. Although left unsaid, that finality is implicitly recognized by the emphasis that the Association places on the role that a resolution by this Court of the proper location of the western boundary might have

on the resolution of other matters in other forums. The Association's contentions regarding the advantages of resolving the boundary now are misplaced.

First, in order to advance its own agenda, the Association would risk the interests of the settling parties who, after five decades, have reached accord over the water rights dispute that is before the Court. The Association blithely assumes that the Master's interlocutory rulings on the host of issues presented to him – which have never been compiled into a final report – would be accepted by the parties and ultimately the Court. Association's brief at 17-18. Certainly, the Tribes are not willing to accept the Master's adverse rulings and there is every reason to believe that the other settling parties, if given the opportunity, would except to the Master's rulings that were contrary to their positions. The settling parties have reached an agreement over water rights; their interests should not be jeopardized in an attempt to accommodate the far different concerns of the Association over the administration of the federal lands which its members would have to lease from the United States under any circumstances. *Cf., Willison v. Watkins*, 28 U.S. 43, 47 (1830) ("[A] tenant cannot dispute the title of his landlord, either by setting up a title in himself, or a third person, during the existence of the lease or tenancy.")

Second, the Association is wrong when it asserts that the expansion of the controversy in this case is necessary to ensure the efficient adjudication of other potential controversies related to the western boundary of the Reservation. *See* Association's brief at 14-16. As the controversy in this case over the Indian Claims Commission

litigation involving the Fort Yuma Indian Reservation demonstrates, the overlap between the various cases involving different claims and issues is complex and the resolution of an issue in one case does not always advance the ability of the courts and parties to efficiently litigate other matters to their final conclusion. Here, the settlement will finally resolve the water rights issues among the parties, while carefully preserving all other issues. *See* Stipulation and Agreement ¶¶ C, D (McGarr Report, Attachment 4). No basis exists for the Association's cavalier assertion that in the absence of expanding this case to include the federal government's treatment of its own land, the matters pending in other cases cannot or will not be resolved in accordance with the applicable law. Association's brief at 16.

Finally, this Court has repeatedly refused to expand this interstate water rights adjudication to include questions outside the area of water rights. *See Arizona v. California*, 373 U.S. at 601; *Arizona v. California II*, 460 U.S. at 638. To be sure, the Court has carefully protected the ability of the State parties to be heard with regard to actions by the Department of the Interior that might affect the outcome of the water rights determination. *See, e.g., Arizona v. California II*, 460 U.S. at 636-37. At the same time, the Court has rejected any effort by the parties to broaden the scope of the litigation to include the determination of title or boundary issues related to the disputed water rights claims. Now that the parties have agreed to resolve the water rights issues, the Court should not switch course to appease a non-party and decline to approve the settlement of the water rights

issues in the absence of a judicial determination of the proper location of the boundary.

B. THE PROPOSED SETTLEMENT DOES NOT CONFLICT WITH THE 1964 ACT.

The Association is wrong when it argues that the proposed settlement conflicts with the Act of April 30, 1964, 78 Stat. 188 ("1964 Act"). The purpose of the 1964 Act was "to declare the Colorado River Reservation . . . to be the property of the Colorado River Indian Tribes." H. R. REP. NO. 88-1304 at 1 (1964) ("House Report"). Because the Reservation was initially established for the Indians of the Colorado River, a dispute had arisen over whether that language would extend the benefits of the Reservation to individuals who were not members of the Tribes but who were "Indians of the Colorado River." House Report at 1-2. The legislation declares the unallotted lands of the Reservation to be held in trust for the benefit of the Tribes, thereby foreclosing continued settlement on the Reservation by other Indians. 1964 Act § 1.

Section 5 of the 1964 Act also extends the Secretary's leasing authority for the Reservation to include 99 year leases. 1964 Act § 5. The Association seizes on section 5 as support for its position because the application of the leasing provisions to the lands west of the river and south of section 25 of township 2 south is foreclosed unless those lands are determined to be a part of the Reservation. *See* Association's brief at 5-7. The legislation, however, does not prescribe the method by which the location of the boundary is to be determined, only that the provisions of the 1964 Act will apply once it is determined. 78

Stat. at 189. It is clear from the history of the 1964 Act that the intent of the provision was to avoid the need for further legislation after the controversy over whether the lands should be included in the Reservation was resolved. House Report at 2.

The simple answer to the Association's concern is that the Reservation boundary has been determined for purposes of the 1964 Act. The Secretary formally declared the area to be within the Reservation in 1969 and subsequently has acted in accordance with that determination. In particular, the United States brought suit against competing claimants, "quieting title in the Tribes to various parcels in the area added to the Reservation." *Arizona v. California II*, 460 U.S. at 631. The United States also proceeded to evict various individuals from the area who failed to enter into appropriate lease agreements with the federal government for the land in question. In other words, those who wished to contest the federal claim to the land in question have had their day in court following the Secretary's determination; that is all that the 1964 Act required.

In any event, even if the concerns of the Association about the effect of the 1964 Act were arguably worthy of consideration, those concerns are not sufficient to set aside the settlement of the longstanding dispute among the settling parties over the extent of the Tribes' water rights. As the Master noted in recommending against the Association's intervention, the Association's argument with regard to the 1964 Act "has existed since *1969*, will continue to exist regardless of the Special Master's boundary determination, and will not be impeded or impaired by the disposition of this litigation." Order No.

17 at 4 (emphasis in original). In sum, the proposed settlement accomplishes only one result: the resolution of the tribal water claims which were the subject of the State parties' 1989 motion. No other issue is affected and the consideration of the Association's arguments elsewhere is not precluded by the proposed settlement. Accordingly, the Court should approve the settlement.

IV. CONCLUSION

For the reasons set forth above, the Tribes respectfully request the Court to disregard the arguments in the proposed amicus brief of the Association and to approve the parties' settlement of the disputed boundary water rights claims for the Colorado River Indian Reservation as recommended by the Special Master.

Respectfully submitted,

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No. 8, Original

In the Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES IN RESPONSE TO THE EXCEPTION OF THE STATE PARTIES

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QUESTION PRESENTED

Whether this Court's decisions in *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*), and *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona II*), preclude the United States and the Quechan Tribe from asserting water rights claims in this proceeding.

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In the Supreme Court of the United States

No. 8, ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES IN RESPONSE TO THE EXCEPTION OF THE STATE PARTIES

STATEMENT

This case is before the Court on exceptions to the Report of Special Master McGarr. The Master has recommended approval of the parties' proposed settlement of the water rights claims of the Fort Mojave and Colorado River Indian Reservations, but has rejected the water rights claims for the Fort Yuma Reservation. See McGarr Rep. 12-14. We have summarized the background of this case and the Master's rulings in the United States' Brief in Support of its Exception to Master McGarr's Report. See U.S. Except. Br. 1-12.

The only contested issue before the Court is whether the water rights claims relating to disputed "boundary lands" of the Fort Yuma Reservation are precluded by prior litigation. The State of Arizona, the State of California, the Coachella Valley Water District, and the Metropolitan Water District of Southern California (collectively the State Parties) argued before the Master that the claims for the disputed portions of the Fort

Yuma Reservation are precluded by: (1) this Court's prior decisions in *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*), and *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona II*); and (2) a consent judgment entered by the United States Claims Court in *Quechan Tribe of the Fort Yuma Reservation* v. *United States*, Indian Claims Comm'n Docket No. 320 (Aug. 11, 1983) (*reprinted at* U.S. Except. Br. App. 66a-67a), which resolved a reservation boundary dispute between the United States and the Quechan Tribe. The Master rejected the State Parties' first argument, but accepted the second. McGarr Rep. 7-8; *id.* App. 2(A) at 1-10.

The State Parties have excepted to the Master's resolution of their first argument (State Parties Except. Br. 1), while the United States and the Quechan Tribe have excepted to his resolution of the second argument (U.S. Except. Br. I; Quechan Except. Br. i). This brief responds to the State Parties' Exception.[1]

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[1] We note that an entity entitled the West Bank Homeowners Association has moved to file a brief amicus curiae objecting to the Master's recommendation that this Court approve the proposed settlement of water rights claims respecting the Colorado River Indian Reservation. The Association consists of a number of persons who lease property from the United States within the current boundaries of the Colorado River Indian Reservation and object to the United States' determination that those lands are part of the Reservation. This Court and Master McGarr have each denied the Association's request to intervene in this proceeding. See *Arizona* v. *California*, 514 U.S. 1081 (1995); Memorandum Opinion and Order No. 17 of Special Master McGarr (Mar. 29, 1995). As the Master noted, the Association and its members do "not own land in the disputed area and makes no claim to title or water rights," *id.* at 2, and their interests will "not be impeded or impaired by the disposition of this litigation," *id.* at 4. As a consequence, the Association's objections, which raise matters that belong in other fora, are not germane to the issues before this Court. See generally Objection of the State of California, the Metropolitan Water District of Southern California, the Coachella Valley Water District, and the Colorado River Indian Tribes to the Motion of the West Bank Homeowners Association for Leave to File Brief Amicus Curiae; see also Reply of the Colorado River Indian Tribes to the Proposed Brief Amicus Curiae of the West Bank Homeowners Association.

SUMMARY OF ARGUMENT

The State Parties are mistaken in their submission that this Court's decisions in *Arizona I* and *Arizona II* preclude the United States and the Quechan Tribe from asserting water rights claims in this proceeding. The Court ruled in *Arizona I* that the Special Master erred in adjudicating boundary disputes respecting the Fort Mojave and the Colorado River Indian Reservations. The Court concluded that the Tribes' water rights claims respecting the disputed boundary lands should instead be resolved at a later date, 373 U.S. at 601, and it entered a Decree that expressly directed that result, 376 U.S. 340, 345 (1964). The United States did not attempt to adjudicate the analogous boundary lands claims for the Fort Yuma Reservation in *Arizona I*, but the manifest implications of that decision, the nature of those claims, the Court's subsequent modifications of the Decree, 439 U.S. 419, 421 (1979), and the Court's statements in *Arizona II*, 460 U.S. at 634, all establish that the Fort Yuma claims were subject to the same rule and could not have been asserted at that time. The Court accordingly expected Master McGarr to decide those claims on their merits in the current proceedings.

Moreover, the State Parties' specific legal arguments respecting claim preclusion are flawed. Contrary to the State Parties' assertions, the Court's preclusion rationale concerning "omitted lands" in *Arizona II* does not

apply to the boundary lands for the Fort Yuma Reservation. The boundary lands claims, unlike the omitted lands claims, present legal issues that were not adjudicated in *Arizona I*. Furthermore, this Court's reasoning in *Arizona I* established that the boundary lands claims could not have been adjudicated in that proceeding. Under bedrock principles of res judicata, it would be inappropriate to preclude the United States and the Tribe from litigating those claims. The State Parties have waived their right to invoke a claim preclusion defense. But waiver aside, the defense is inapplicable here for the straightforward reason that the United States and the Quechan Tribe did not, and could not, assert their boundary lands claims in the prior proceedings.

ARGUMENT

THIS COURT'S DECISIONS IN *ARIZONA I* AND *ARIZONA II* DO NOT PRECLUDE THE UNITED STATES AND THE QUECHAN TRIBE FROM ASSERTING WATER RIGHTS CLAIMS FOR BOUNDARY LANDS IN THIS PROCEEDING

The State Parties contend that the Court's prior decisions in this ongoing original action preclude the United States and the Quechan Tribe from asserting water rights claims based on changes in the boundaries of the Fort Yuma Reservation that the United States recognized during the course of the litigation. To place the State Parties' argument in perspective, we begin by reviewing the history of the so-called boundary lands claims. We then address the State Parties' specific contentions.

A. The Origins And History Of The Boundary Lands Litigation Demonstrate That This Court Intended Master McGarr To Decide The Boundary Lands Claims On The Merits

Arizona commenced this original action in 1952 to obtain a judicial resolution of its entitlement to waters of the Colorado River Basin. See U.S. Except. Br. 2-3. In response, the United States asserted water rights for the reservation of the Quechan Tribe as well as for the reservations of four other Indian entities: the Chemehuevi, Cocopah, Fort Mojave, and Colorado River Indian Tribes. See *id.* at 3. When the first Special Master in this case, Simon Rifkind, evaluated the United States' Indian water rights claims, he concluded that he needed to resolve certain existing boundary disputes respecting the Fort Mojave and Colorado River Indian Reservations to determine the "practicably irrigable" acreage in each of those Reservations. See *id.* at 4; Rifkind Report 274-278, 283-287 (1960). This Court concluded, however, that the Master should not have reached those "boundary lands" issues. The Court stated that it was "unnecessary to resolve those disputes here" because, "[s]hould a dispute over title [to the boundary lands] arise because of some future refusal by the Secretary [of the Interior] to deliver water to either area, the dispute can be settled at that time." *Arizona I*, 373 U.S. at 601.

At the time that the proceedings in *Arizona I* were taking place, the United States was engaged in litigation with the Quechan Tribe, before the Indian Claims Commission, respecting the boundaries of the Tribe's Fort Yuma Indian Reservation. See U.S. Except. Br. 18-19. Although Master Rifkind had addressed the Fort Mojave and Colorado River Indian

Tribes' boundary disputes, he had no occasion whatsoever to resolve the Quechan Tribe's ongoing boundary dispute. The United States did not assert a water rights claim for the Quechan Tribe's boundary lands in the *Arizona I* proceedings because the Solicitor of the Department of the Interior had previously determined, in a 1936 opinion, that the Quechan Tribe did not own those lands. The United States had relied on the Solicitor's determination in the Indian Claims Commission proceeding. See *id.* at 17-18. The United States accordingly determined that it was not appropriate to assert a water rights claim in the proceedings before Master Rifkind for lands that the United States contended, in another forum, the Tribe did not own. The United States' conclusion that it should not assert a claim for the disputed boundary lands of the Fort Yuma Reservation in the face of the Indian Claims Commission proceeding proved to be consistent with this Court's decision in *Arizona I*. As we have explained, the Court held that the Master should not have resolved boundary lands disputes involving the Fort Mojave and Colorado River Indian Reservations. See 373 U.S. at 601. By the same reasoning, the Master could not have resolved the analogous boundary land disputes involving the Fort Yuma Reservation.

Following its decision in *Arizona I*, the Court entered its initial Decree, which contained three provisions of current interest. See *Arizona* v. *California*, 376 U.S. 340 (1964). First, the Decree recognized the prospect that future determinations of reservation boundaries could alter the water rights of the affected Tribes. Article II(D)(5) stated, with specific reference to the Fort Mojave and Colorado River Indian Reservations, that the quantities of water provided for those Reservations "shall be subject to appropriate adjust-

ment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.* at 345. Second, Article VI provided that the parties should provide the Court with a list of the outstanding present perfected rights (including Indian water rights) in the mainstream waters and that, if the parties were unable to reach agreement, any party could apply to the Court for determination of present perfected rights. *Id.* at 351-352.[2] Third, Article IX provided that the Court would retain "jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." *Id.* at 353.

The parties were unable to reach agreement on the present perfected rights and, in 1977, they returned to the Court and moved for a determination of those rights. See U.S. Except. Br. 5; *Arizona II*, 460 U.S. at 611-612; Tuttle Report 18-19.[3] During the following year, while those motions were pending, two significant events occurred. First, the five individual Indian Tribes, including the Quechan Tribe, moved to intervene in the suit on the ground that the United States was not adequately representing their interests. See *Arizona II*, 460 U.S. at 612; Tuttle Report 20-21. Second, the State Parties and the United States were able to reach agreement on the question of present perfected rights and, on May 30, 1978, they filed a joint

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[2] The State Parties erroneously identify Article II(d)(5) as the Article providing for submission of lists of present perfected rights. See State Parties Except. Br. 10.

[3] As we explain below, the Court appointed Judge Elbert P. Tuttle to succeed Simon Rifkind as the Special Master in this case. His report, filed in 1982, describes those motions and the ensuring events.

motion for entry of a Supplemental Decree describing those rights. See *id.* at 18-19.

The State Parties and the United States initially opposed the Tribes' intervention, but the United States later dropped its opposition and, on December 22, 1978, moved for entry of a Supplemental Decree to grant additional water rights to the Indian Tribes. *Arizona II*, 460 U.S. at 612. Those proposed water rights encompassed both the disputed boundary lands for the Fort Yuma Reservation and other Reservations, as well as certain other lands, known as "omitted" lands, that were within the 1964 boundaries of the Reservations but for which the United States had not claimed water rights. See *ibid.*; Tuttle Report 22-24. The United States' change in position was motivated, in part, by a change in the Interior Department's views respecting the boundaries of the Fort Yuma Reservation. On December 20, 1978, the Secretary of the Interior had entered an order holding that the United States did, in fact, hold the disputed boundary lands in trust for the Quechan Tribe. See U.S. Except. Br. 20-24. The United States therefore revised its position in the *Arizona* v. *California* suit to protect the Quechan Tribe's entitlement to water rights in the ongoing litigation. See *id.* at 25; see also *Arizona II*, 460 U.S. at 632-633 (describing the boundary lands claims respecting the Fort Yuma Indian Reservation).

This Court responded to those developments by: (1) entering the 1979 Supplemental Decree; (2) denying the motions of the Fort Mojave, Chemehuevi, and Quechan Tribes to intervene insofar as they sought to oppose entry of the Supplemental Decree; and (3) referring other matters raised by the United States and the five Tribes to a second Special Master, Senior Judge Elbert P. Tuttle, for his recommendations. See *Arizona II*, 460 U.S. at 612. Significantly, the parties agreed to revise Article II(D) of the 1964 Decree to enlarge the number of Tribes that could assert boundary lands claims. See *Arizona* v. *California*, 439 U.S. 419, 421 (1979). As a result of the 1979 Supplemental Decree, Article II(D)(5) Decree stated:

> The quantities [of water] fixed in [the 1964 Decree sections setting forth the water rights of each of the five Tribes] shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Ibid. (as quoted, with bracketed passages supplied by this Court, in *Arizona II*, 460 U.S. at 634). In the words of this Court, the 1979 Supplemental Decree "not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other Reservations." *Ibid.* The Court referred the boundary lands issues, together with the omitted lands issues, to Master Tuttle. *Ibid.*

Master Tuttle prepared a Final Report explaining his recommendations. See *Arizona II*, 460 U.S. at 612-613. He concluded that the Tribes should be allowed to intervene, see Tuttle Report 22-23, and he then addressed the omitted lands issues, see *id.* at 29-55, and the boundary lands issues, see *id.* at 55-76. In the case of the omitted lands claims, the State Parties argued that the Tribes were precluded by principles of res judicata from claiming additional water rights because the United States should have made claims for those lands in the proceedings before Master Rifkind. See *id.* at 29-30. Master Tuttle rejected that argument and

concluded that Article IX of the Decree, which preserved the Court's power to modify the Decree, 376 U.S. at 353, permitted the United States and the Tribes to seek the additional water rights. See Tuttle Report 32. In the case of the boundary lands claims, the State Parties did *not* raise a preclusion defense. To the contrary, as Master Tuttle explained:

> All the parties agree that the Court should now determine any additional present perfected rights. Although the 1964 Decree acknowledged and expressly provided for boundary disputes only with respect to the Fort Mojave and Colorado River Indian Reservations, the additional proviso of the 1979 Decree, issued after the Court was apprised of boundary disputes concerning the other Reservations, indicates that the amounts determined for all five Reservations "shall continue" to be subject to adjustment. Thus, adjustments for boundary determinations affecting any of the Reservations were explicitly provided for in the 1979 Decree and impliedly contemplated in the 1964 Decree "in the event that the boundaries of the respective reservations are finally determined." [footnote omitted]
>
> The State Parties concede that when the boundary lines have been finally determined, the Court should allot the water rights in proportion to the practicably irrigable acreage of additional boundary lands, and urge that the Court should now consider such an allotment [footnote omitted]. They contend, however, that the boundaries have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court. The issue, then, is whether the Secretarial orders, court judgments, and Act of Congress re-

> lied on by the Tribes and the United States are the sort of final determinations contemplated by the Court's Decrees.

Tuttle Report 56-57.[4] Master Tuttle determined that he should not make de novo boundary findings and instead concluded that "the determinations that have been made with respect to the stated boundary changes"—including the Secretarial order respecting the Fort Yuma Reservation of the Quechan Tribe—"may be accepted as final for the purpose of considering additional allocations of water rights to the Reservations." *Id.* at 63.

This Court's *Arizona II* decision rejected Master Tuttle's determinations that preclusion principles do not apply to the omitted lands, 460 U.S. at 615-628, and that Secretarial orders respecting the Fort Yuma, Fort Mojave, and Colorado River Indian Reservations constituted "final" determinations of the Reservation boundaries, *id.* at 628-641. But the *Arizona II* decision in no way suggested that the Tribes' boundary lands claims were precluded by prior litigation. To the contrary, the Court recognized that the boundary disputes affecting the Fort Yuma Reservation shared the same undecided status as the boundary disputes affect-

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[4] Master Tuttle also noted that Article IX, which allowed the Court to modify the existing Decree, "even most narrowly construed, would recognize the propriety of entertaining claims as to the Chemehuevi, Fort Yuma, and Cocopah Reservations paralleling those that can be raised as to the Fort Mojave and Colorado River Reservations under Article II(D)(5)." Tuttle Report 56-57 n.73.

ing the Fort Mojave and Colorado River Indian Reservations:

> Our supplemental decree of 1979 did not * * * resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations.

Id. at 634. In addition, the Court indicated its understanding that the boundary lands issues had not been—but would be—determined on the merits:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums.

Id at 638. Plainly, if the Court believed that its decisions in *Arizona I* and *Arizona II* had precluded any of the Tribe's boundary lands disputes, it would not have directed that they "would be settled" elsewhere. Instead, the Court directed that the parties should attempt to resolve the boundary lands issues through district court litigation. *Ibid.* Thereafter, the Court reiterated, through its 1984 Supplemental Decree, that the water rights for all five Indian Reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona* v. *California*, 466 U.S. 144, 145 (1984).

The district court ultimately proved to be an inappropriate forum for resolving the boundary lands claims, which led to a renewal of proceedings in this Court and the appointment of Master McGarr to resolve those

claims. See *Metropolitan Water Dist. of S. Cal.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court, 490 U.S. 920 (1989); McGarr Report 4-6. In light of the foregoing history, there can be little doubt that the Court did not view its decisions in *Arizona I* and *Arizona II* as precluding the claims for the disputed boundary lands of the Fort Yuma Reservation. To the contrary, the Court's decision in *Arizona II* and the 1979 and 1984 Supplemental Decrees made clear that Master McGarr was to determine all of the Indian water rights claims arising from boundary lands disputes, including those of the Fort Yuma Reservation, on their merits. Against that background, we next address the State Parties' specific arguments.

B. The Court's Preclusion Rationale Concerning "Omitted Lands" In *Arizona II* Does Not Apply To The Boundary Lands Claims For The Fort Yuma Reservation

The State Parties contend that the rationale that this Court expressed in *Arizona II* for precluding the United States and the Indian Tribes from asserting omitted lands claims should also preclude the United States and the Quechan Tribe from pursuing boundary lands claims for the Fort Yuma Reservation. State Parties Except. Br. 19-20. The State Parties overlook at least three fundamental distinctions between the omitted lands claims at issue in *Arizona II* and the boundary lands claims at issue here.

First, the Court concluded in *Arizona II* that the omitted lands claims should be precluded primarily because the Court should "not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made." 460 U.S. at 623-624, 625. The Court noted that "while the technical

rules of preclusion are not strictly applicable" to sequential proceedings in a single case within the Court's original jurisdiction, the res judicata principles upon which those rules are founded "should inform our decision." *Id.* at 619. The Court gave special weight to the "fundamental precept of common-law adjudication" that "an issue once determined by a competent court is conclusive." *Ibid.* (citing *Montana* v. *United States*, 440 U.S. 147, 153 (1979)). The Court's decision in *Arizona I* had comprehensively addressed and resolved the factual questions respecting what lands within the 1964 reservation boundaries were "practicably irrigable," and the Court was understandably reluctant to recalculate the irrigable acreage. The Court recognized that allowing relitigation of those factual issues could "open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree." *Id.* at 625.

The current dispute over the boundaries of the Fort Yuma Reservation rests on a different footing. The boundary lands claims do not call for the redetermination of factual issues that were fully and fairly litigated in the *Arizona I* proceedings. Rather, they turn on the validity of a 1978 Secretarial order holding, based on an opinion of the Solicitor of the Interior, that certain federal lands are, and have always been, part of the Fort Yuma Indian Reservation. See U.S. Except. Br. 23-24. The validity of that order presents a question of law—the meaning and effect of an 1893 Agreement between the United States and the Quechan Tribe (see U.S. Except. Br. App. 1a-10a)—that was not briefed or decided in the prior proceedings.

Second, the boundary lands claims for the Fort Yuma Reservation *could not have been decided* in the *Arizona I* proceedings. This Court expressly ruled in *Arizona I* that Master Rifkind erred in deciding the boundary

lands claims of the Fort Mojave and Colorado River Indian Tribes. See 373 U.S. at 601. The Court essentially held that Master Rifkind had acted prematurely in resolving the underlying boundary disputes, which might be resolved in other fora. See *ibid.* By the same reasoning, Master Rifkind could not have resolved the analogous boundary dispute concerning the Fort Yuma Reservation, which was already the subject of litigation before the Indian Claims Commission. See pp. 5-6, *supra*.

The res judicata principles of merger and bar can preclude claims that were or could have been advanced in prior litigation between the parties. See, *e.g.*, *Rivet* v. *Regions Bank*, 522 U.S. 470, 476 (1998); *Richards* v. *Jefferson County*, 517 U.S. 793, 797 n.4 (1996); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1876); Restatement (Second) Judgments §§ 17-19, 24 (1982). Those principles, however, do not preclude claims that could not have been decided in the prior proceedings. See, *e.g.*, *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 327-328 (1955); Restatement (Second) Judgments §§ 20, 26 (1982); Charles A. Wright et al., *Federal Practice and Procedure* § 4415, at 122 (1981) ("Preclusion is inappropriate * * * as to matters that could not be advanced in the first action."). For example, the Restatement points out:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second

> action is precluded by operation of the substantive law.

Restatement (Second) Judgments § 20(2) (1982). Compare *Arizona I*, 373 U.S. at 601 ("We hold that it is unnecessary to resolve [the boundary] disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to [a disputed] area, the dispute can be settled at that time.").

Third, the Restatement likewise points out:

> When any of the following circumstances exist, the general rule of [Restatement] § 24 [against splitting claims] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein;
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action;
>
> * * * * *

Restatement (Second) Judgments § 26(1) (1982); see, *e.g.*, Charles A. Wright et al., *Federal Practice and Procedure* § 4413, at 106 (1981) ("A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion."). That principle is directly applicable here, for the 1979 and 1984 Supplemental Decrees expressly provided for adjustment of water

rights upon final determination of reservation boundaries. See Article II(D)(5) of the 1984 Supplemental Decree, 466 U.S. at 145 (The water rights of all five of the Indian Tribes "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined."); Article II(D)(5) of the 1979 Supplemental Decree, 439 U.S. at 421 (accord). By contrast, no provision of the 1964 Decree or the 1979 and 1984 Supplemental Decrees expressly provided for adjustment of water rights based on "omitted lands."

Those general principles should inform the Court's decision here. This Court's decision in *Arizona I*, which expressly held that Master Rifkind erred in prematurely reaching disputed boundary issues respecting the Fort Mojave and Colorado River Indian Reservations, 373 U.S. at 601, leaves no doubt that Master Rifkind likewise could not have entertained the boundary lands claims respecting the Fort Yuma Reservation. The Court expressly deferred decision on those claims through Article II(D)(5) of its 1964 Decree, it retained jurisdiction over this case under Article IX, and it expressly left open the boundary lands issues for all five Reservations in the 1979 and 1984 Supplemental Decrees. As the Court noted in *Arizona II*, 460 U.S. at 624, it frequently retains jurisdiction precisely because of "the need for flexibility in light of changed conditions *and questions which could not be disposed of at the time of an initial decree*." (emphasis added). See also Tuttle Report 56-57 n.73 ("Article IX, even most narrowly construed, would recognize the propriety of entertaining claims as to the * * * Fort Yuma [Reservation].").

In short, the Court's decisions in *Arizona I* and *Arizona II*, as well as its 1979 and 1984 Supplemental

Decrees, make clear that the boundary lands claims for the Fort Yuma Reservation present open issues that are to be decided in an appropriate forum and at an appropriate time. This Court's decisions pose no bar to the Master's resolution of those issues on their merits in proceedings on remand.

C. The Preclusion Defense Has In Any Event Been Waived In, And Foreclosed By, Prior Proceedings In This Case

The State Parties admit that they did not raise their preclusion defense to the boundary lands claims for the Fort Yuma Reservation in this Court until July 19, 1989, when they initiated the current proceedings. See State Parties Except. Br. 16. Recognizing that they have raised a preclusion defense late in this litigation, the State Parties argue that they "did not waive their right" to present that defense and that they have not presented the defense in an "untimely" manner. State Parties Except. Br. 21-24, 24-26. We disagree.

This Court's Rules state that the Federal Rules of Civil Procedures "may be taken as guides" in the conduct of actions within the Court's original jurisdiction. Sup. Ct. R. 17.2. See *Nebraska* v. *Wyoming*, 507 U.S. 584, 590 (1993). The Federal Rules direct that "a party shall set forth affirmatively" in its pleadings affirmative defenses and expressly includes, among those defenses, "res judicata." Fed. R. Civ. P. 8(c); see also Fed. R. Civ. P. 12(b). See *Rivet*, 522 U.S. at 476 ("Claim preclusion (res judicata), as Rule 8(c) of the Federal Rules of Civil Procedure makes clear, is an affirmative defense."); *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 350 (1971) ("*Res judicata* and collateral estoppel are affirmative defenses that must be pleaded."). If a party fails to plead res judicata, the courts deem the affirmative defense waived. See

Huffman v. *Pursue, Ltd.*, 420 U.S. 592, 607-608 n.19 (1975) ("appellants did not plead res judicata in the District Court, and it is therefore not available to them here").

The State Parties contend that they have not waived that affirmative defense because the 1979 and 1984 Supplemental Decrees do not expressly prevent the Court from considering it (State Parties Except. Br. 21-24). But, as the term affirmative defense implies, the fact that the Supplemental Decrees do not mention claim preclusion did not absolve the State Parties of their affirmative obligation to raise that defense in response to the United States' December 22, 1978, Motion for Modification of the Decree. The State Parties also contend that their defense is not untimely because, in their view, a court may raise a res judicata defense sua sponte at any time (State Parties Except. 24-26). While this Court has observed that "trial courts may in appropriate cases raise the res judicata bar on their own motion," *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995), the fact remains that neither Master Tuttle nor the Court did so in the *Arizona II* proceedings. The State Parties' invocation of that defense in these proceedings comes far too late.

More fundamentally, not only did the State Parties fail to raise res judicata as an affirmative defense, but they stipulated to a Supplemental Decree in 1979 that expressly extended to all five Reservations the provisions of Article II(D)(5) of the 1964 Decree—which had theretofore expressly applied only to the Fort Mojave and Colorado River Indian Reservations—for appropriate adjustments in previously adjudicated water rights in the event that the boundaries of the five Reservations were thereafter "finally determined." Because the purpose of Article II(D)(5) of the 1964 Decree was

to provide for adjustments of water rights based on the inclusion of boundary lands in the Fort Mojave and Colorado River Indian Reservations *notwithstanding* the Court's decision in *Arizona I*, the express extension of that Article to all five Reservations in 1979—after the United States sought additional water rights for the boundary lands of the Fort Yuma Reservation—necessarily allows for such adjustments respecting the Fort Yuma Reservation, notwithstanding the Court's decision in *Arizona I*.

If the State Parties had thought otherwise, and believed that they had a valid preclusion defense to the boundary lands claims for the Fort Yuma Reservation even after entry of the 1979 Supplemental Decree, they certainly would have raised that defense in the proceedings before Master Tuttle. They did not do so. To the contrary, the State Parties consented to a determination of the boundary lands claims on the merits. See Tuttle Report 56-57. The State Parties' willingness to have the boundary lands claims determined on the merits stands in stark contrast to their approach to the Tribes' omitted lands claims. The State Parties vigorously asserted a preclusion defense to those claims in the proceedings before Master Tuttle. See Tuttle Report 29-55. The State Parties' decision to raise a preclusion defense to the omitted lands claims, but not to the boundary lands claims, suggests both that they made a strategic decision to forgo raising a preclusion defense in response to the latter claims and that they understood that such a defense was foreclosed by Article II(D)(5) of the 1979 Supplemental Decree.

If the Court concludes that the defense is not altogether foreclosed, however, the defense should be rejected on the merits. As we explain in Point B, *supra*, the boundary lands claims for the Fort Yuma

Reservation are not precluded by this Court's decisions in *Arizona I* and *Arizona II* because those claims were not decided, and could not have been decided, in the prior litigation. Instead, those claims were left open for future decision in accordance with the express terms of the 1979 and 1984 Supplemental Decrees.

D. The Master's Ultimate Recommendation That This Court's Decisions In *Arizona I* And *Arizona II* Do Not Preclude The Boundary Lands Claims Is Correct

The State Parties challenge the Master's reasoning that res judicata does not preclude the United States and the Quechan Tribe from asserting boundary lands claims because the Secretary's 1978 order recognizing that the lands in question are part of the Fort Yuma Reservation was a "later and unknown circumstance" that the United States could not have anticipated. State Parties Except. Br. 26-27. See McGarr Report App. 2(A) at 7. Although this Court customarily retains jurisdiction to modify its Decrees in response to changed circumstances, see, *e.g.*, *Nebraska*, 507 U.S. at 590-593; *Arizona II*, 460 U.S. at 624-625, the United States does not rely on that rationale in this case. Rather, we submit that the boundary lands claims are not precluded, under basic principles of res judicata, because that defense is foreclosed and because this Court's decisions in *Arizona I* and *Arizona II* establish that those claims were not decided, and could not have been decided, in the prior proceedings. See pp. 5-21, *supra*. The Master's ultimate recommendation is surely correct standing on those bases alone, and there is no occasion to explore the more difficult and fact-specific question of what types of "changed conditions" would justify the modification of this Court's water rights decrees. See *Nebraska*, 507 U.S. at 593.

E. The Boundary Lands Claims For The Fort Yuma Reservation Should Be Remanded For Further Proceedings

The Master properly rejected the State Parties' argument that this Court's prior decisions preclude the United States and the Quechan Tribe from asserting boundary lands claims for the Fort Yuma Reservation. The Master erred, however, for the reasons set forth in the Brief for the United States in Support of Exception, in holding that the 1983 consent judgment entered in the United States Claims Court precluded the United States and the Tribe from making those claims. See U.S. Except. Br. 14-41. The Court should therefore remand those issues to the Master for further proceedings. As we have said in our own Exception Brief (at 42-43), we are hopeful that, if the matter is returned to the Master, a proposed settlement can be reached. But if the parties are unable to negotiate a proposed settlement of those issues, the issues should be adjudicated on the merits. *Ibid.*

CONCLUSION

The exception of the State Parties to the Report of the Special Master should be overruled.

Respectfully submitted.

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No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

THE STATE PARTIES' REPLY TO EXCEPTIONS OF THE UNITED STATES AND THE QUECHAN INDIAN TRIBE TO REPORT OF THE SPECIAL MASTER

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February 2, 2000

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THE STATE PARTIES' REPLY TO EXCEPTIONS OF THE UNITED STATES AND THE QUECHAN INDIAN TRIBE TO REPORT OF THE SPECIAL MASTER

I. INTRODUCTION

The Special Master's Report of July 28, 1999 ("Rep."), describing it as a "close question," rejected the State Parties' contention that the finality principles applied by this Court in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), and *Nevada v. United States*, 463 U.S. 110 (1983), precluded consideration of the claims by the United States and the Quechan Tribe ("Tribe") for a water allocation for the disputed boundary lands on the Fort Yuma Indian Reservation ("FYIR"). Rep. App. 2A, Memorandum Opinion and Order No. 4 ("Mem. Opin. No. 4") at 7.

However, the Special Master did not find the State Parties' argument as to the preclusive effect of payment of the 1983 Claims Court judgment in Docket No. 320 ("Claims Court judgment") a similarly close question. On the contrary, he found that the plain language of that $15 million settlement judgment drafted by the United States and the Tribe extinguished, unequivocally and without reservation of any kind, any "claims" by the Tribe to the beneficial ownership of the disputed boundary lands. Consequently, he concluded that they could not provide the basis for a reserved water rights claim under *Winters v. United States*, 207 U.S. 564 (1908), as applied to the undisputed lands on the FYIR in *Arizona v. California*, 373 U.S. 546, 595-601 (1963) ("*Arizona I*").[1] *Id.*

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[1] In *Arizona I* the Tribe had been awarded 51,616 acre-feet of diversions for lands in the undisputed portion of the Reservation. *Arizona v. California*, 376 U.S. 340, 344 (1964) Decree). In *Arizona II*, 460 U.S.

(continued...)

at 7-10; Rep. Apps. 2B and 2C, Mem. Opin. Nos. 5 and 7.

The United States and the Tribe have filed exceptions to the Special Master's decision.[2] They contend that the Claims Court judgment cannot bear its plain meaning when "read against the history of the Quechan land dispute." U.S. Br. 32. The Court is asked to rely instead on their analysis of the proceedings before the Claims Court and alleged implications of several associated documents, particularly (1) the 1978 order by Secretary of the Interior Cecil Andrus ("1978 Secretarial order") redefining the boundary of the FYIR and purporting to restore the disputed boundary lands to the Tribe, (2) some pretrial stipulations filed in the Claims Court proceedings, and (3) a letter to the Tribe from an Acting Deputy Assistant Secretary of the Interior for Indian Affairs approving, as the Tribe's trustee, the settlement. The Tribe, but not the United States, also places great reliance on a letter from the Tribe's counsel to the Quechan Tribal Council explaining the proposed settlement. Tr. Br. 23-25. Missing from their arguments is any

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[1] (...continued)
at 636, this Court rejected Special Master Tuttle's recommendation that the decreed diversion right be increased to 130,135 acre-feet by an award of an additional 78,519 acre-feet, consisting of an award of 37,172 acre-feet on the United States' claim of irrigable acreage in the disputed boundary lands and an additional award of 41,347 acre-feet on the Tribe's supplemental claim that even more of the lands were irrigable. Report of Special Master Elbert P. Tuttle (February 22, 1982) at 196, 254, and 281. The Tribe's statement that it would only have been "entitled to an additional allocation of 40,734 acre-feet of water" (Tr. Br. 33) for the disputed boundary lands appears to be in error by overlooking the supplementary nature of its claim.

[2] Exception of the United States and Brief for the United States in Support of Exception (December 1999) ("U.S. Br."); Exception of the Quechan Indian Tribe to the Report and Recommendation of the Special Master and Supporting Memorandum (December 20, 1999) ("Tr. Br.").

meaningful discussion of the significant impact of this Court's decision in *Arizona II* on the settlement.

The United States and the Tribe also assert that the preclusive effect of the Claims Court judgment is controlled by common law principles of collateral estoppel, which they allege the Special Master misapplied.

II. STATEMENT

Summary of the Claims Court Proceedings in Docket No. 320

In 1951 the Tribe filed a "Petition for Loss of Reservation" with the Indian Claims Commission ("Commission") (U.S. Br. App. 11a) pursuant to the Indian Claims Commission Act of 1946 ("ICC Act")[3] asserting a claim for money damages arising "from the expropriation of the greater part" of the Tribe's 1884 reservation by the United States. *Id.* at 13a-14a, ¶6. Specifically, the Tribe alleged that the 1893 Cession Agreement between the Tribe and the United States ("1893 Agreement"), ratified by Congress in the Act of August 15, 1894, 28 Stat. 286 ("1894 Act"), had been obtained through fraud, coercion and unconscionable consideration rendering the agreement "wholly nugatory." *Id.* at 17a, ¶15. It also alleged that the 1893 Agreement "constituted a taking of lands belonging to the Petitioner without payment of just compensation" or, in the alternative, "an appropriation of lands belonging to the Petitioner for an unconscionable consideration and under conditions of fraud and duress." *Id.* at 19a, ¶19; 20a,

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[3] 60 Stat. 1049. The Act was codified at 25 U.S.C. §§70 *et seq.*, until September 30, 1978 when the Commission's life expired. See notes at 25 U.S.C. §§70-70v-3 (1998). The relevant sections of the Act are set out in the Appendix to this brief.

¶22. The petition also alleged that the 1894 Act had unilaterally altered the provisions of the 1893 Agreement to the Tribe's detriment. *Id.* at 18a, ¶17. In its Prayer for Relief the Tribe sought determinations that the boundary lands in dispute here were "wrongfully taken" and "wrongfully acquired" by the United States and sought compensation for the land "wrongfully appropriated" by the United States. *Id.* at 22a.

In 1958 the Tribe filed an "Amendment to Petition for Loss of Reservation." It added a fifth alternative cause of action alleging that the United States had defaulted in its obligations under the 1893 Agreement and, if the Commission determined that the 1893 Agreement was valid and binding, seeking damages for the United States' breach. *Id.* at 24a. The Tribe never again amended its complaint, not even after Secretary Andrus' 1978 order reinterpreted the 1893 Agreement as being invalid and purported to restore the disputed boundary lands to the Reservation.

After a trial was concluded on the liability phase of the case, the Commission stayed further proceedings in 1970 because legislation had been proposed in Congress to return the disputed boundary lands to the Tribe.[4] The proposed legislation was not enacted and the Tribe moved the Commission to vacate the stay order, reopen the record on liability and "declare the 1893 Agreement to be invalid and that plaintiff has retained title to its land." (26 Ind. Cl. Comm'n 15 (1971)) U.S. Br. App. 30a, 31a. The Commission vacated the stay, but held that it was "without authority to determine that

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[4] 25 U.S.C. §398d provides: "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." The FYIR was created by an executive order of January 9, 1884. U.S. Br. 16.

the 1893 Agreement was invalid, and at most can determine monetary damages" for the Tribe's claims. *Id.* at 32a.

Having thus been rebuffed in its effort to quiet title to the disputed boundary lands before the Commission, and being long out of time to seek such relief under the recently enacted Quiet Title Act of 1972, 28 U.S.C. §2409a (1998),[5] sometime in 1973 the Tribe apparently requested the Secretary to reverse the 1936 opinion by Solicitor Margold (U.S. Br. 17-18, 20-21), on which the United States had relied in claiming water rights for the FYIR in *Arizona I*,[6] and to seek additional water rights for the disputed boundary lands from this Court.[7] Solicitor Austin and Secretary Kleppe declined to take that action in 1976 (U.S. Br. 21-22), but the Tribe was successful with the new Carter Administration, persuading Solicitor Krulitz and Secretary Andrus to do so in December 1978. *Id.* at 22-24. In essence, the Secretary administratively quieted title to the disputed boundary lands in the Tribe, seemingly circumventing the exclusive authority of the Commission under the ICC Act (page 10 *infra*), the exclusive authority of the federal district courts under the Quiet Title Act, *Block v. North Dakota*, 461 U.S. 273 (1983), and the exclusive prerogative of Congress to change the reservation boundary (note 4 *supra*).

Assuming that the title or liability issue had thus been "finally determined" in the Tribe's favor, the United States and

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[5] *See Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987).

[6] See "Exception by State Parties to Report of Special Master and Supporting Brief" (December 20, 1999) at 7-9.

[7] The Tribe's initiative was not uncommon in the 1970's. *See Temoak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct.Cl. 1979), *cert. denied*, 444 U.S. 973 (1979).

the Tribe agreed to proceed to the damages phase of the Claims Court proceedings. However, this Court's 1983 decision in *Arizona II* that the Secretary's 1978 order was not a "final determination" of the disputed boundary for purposes of an increased water allocation stimulated a proposal by the Tribe for a cash settlement (page 33 *infra*).

On June 16, 1983 the Tribe authorized "*full settlement of the claims* of the Tribe, in Docket No. 320" for $15 million. *Id.* at App. 55a (emphasis added). Inasmuch as the Attorney General was the only federal official authorized to enter into a settlement of the claims, the Assistant Attorney General for Land and Natural Resources submitted a memorandum to the Deputy Attorney General entitled "Recommendation to Accept Offer of Settlement in the Amount of $15,000,000" ("settlement memorandum").[8] On July 8, 1983 the Attorney General accepted the Tribe's offer on certain conditions, which the Tribe approved the same day. *Id.* at 43a. After an Assistant Secretary of the Interior, as trustee for the Tribe, had approved the settlement as "fair and just" (*id.* at 62a), the parties filed a "Joint Motion for Approval of Settlement and Entry of Final Judgment." *Id.* at 63a.

On August 11, 1983 Chief Claims Court Judge Kozinski granted the motion and entered the stipulated "Final Judgment" for the Tribe in the amount of $15 million which, *inter alia*, stated that it "shall finally dispose *of all* rights, *claims*, or demands *which plaintiff has asserted* or could have

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[8] The United States identified the settlement memorandum during discovery but declined to produce it on the grounds that it is not relevant to the meaning of the Claims Court judgment and is a privileged attorney-client communication or, in the alternative, protected under the work product doctrine. The Special Master sustained that objection. Mem. Opin. No. 4 at 8.

asserted" in the case and, *inter alia*, "barred [the Tribe] from . . . *any* future action on the *claims* encompassed in Docket 320." *Id.* at 66a-67a (emphasis added). The judgment amount was duly paid to the Tribe. 50 Fed. Reg. 12410 (1985).

III. SUMMARY OF THE ARGUMENT

The Claims Court judgment unambiguously "disposed" of "all" of the Tribe's pending "claims" for a $15 million payment by the United States and "barred . . . any future action" on them. Those claims could only be identified by reference to the Tribe's petition before the Commission, which alleged that the United States had "expropriated" the disputed boundary lands and sought just compensation for that "taking." Contrary to the United States' astounding assertion that "the Master misunderstood the nature of the Claims Court's judgment and its legal significance,"[9] he clearly understood and correctly interpreted the plain language of that judgment and its legal effect under controlling case law. The efforts by the United States and the Tribe to amend that judgment based on unfounded inferences they would have the Court draw from several selected background documents associated with the Claims Court proceedings must be rejected both because (1) reliance on such extrinsic evidence would be inappropriate and (2) in any event, the documents do not support their claims.

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[9] U.S. Br. 32. In a similar vein, the Tribe's first motion for reconsideration of the Special Master's decision contended that the State Parties had "misrepresented to the Special Master the Quechan Tribe's claim in Docket No. 320" and "intentionally misled" him. Motion for Reconsideration of the Special Master's Ruling of September 6, 1991, Filed by the Quechan Tribe of Indians (September 20, 1991) at 2. Special Master Frank McGarr is a highly respected retired Chief Judge of the United States District Court for the Northern District of Illinois.

The United States' protracted discourse on why the Claims Court settlement judgment did not reflect the actual intent of the parties who wrote it is a flawed *post hoc rationalization* of the meaning of the Claims Court judgment and should be rejected. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("courts may not accept appellate counsel's post hoc rationalizations for agency action").

The United States and the Tribe ignore the *statutory preclusion* principles applicable to payments of judgments under the ICC Act, erroneously relying instead on common law principles of collateral estoppel. The applicable law is not "the legal principles governing claim and issue preclusion" as the United States contends (U.S. Br. 32), devoting seven pages of its brief to that subject (U.S. Br. 35-41) but, amazingly, not even mentioning the "statutory preclusion" cases relied on by the Special Master (page 21 *infra*). The Tribe presents a similar discussion on the law of collateral estoppel (Tr. Br. 16-22), as well as a long argument on the merits of the dispute over the legal effect of the 1893 Agreement. Tr. Br. 27-33. Inasmuch as the Special Master did not address the merits of the dispute, neither do the State Parties, other than to note that they agree with the reasoning and conclusions of Solicitor Austin in 1977. 84 Int. Dec. 1 (1977).[10]

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[10] The United States' asserts that the Austin opinion had been issued "under unusual circumstances." U.S. Br. 22-23. The only "unusual circumstance" surrounding the Austin opinion is that it was issued after the affected water users in Arizona and California were granted a two day hearing before Solicitor Austin and Secretary Kleppe, in sharp contrast to the *ex parte* decisions previously rendered on the Fort Mojave and Colorado River Indian Reservation boundary disputes and Solicitor Krulitz on this dispute. *Arizona II* at 631-32, 636-37.

The State Parties also note that before the Claims Court in Docket No. (continued...)

The Claims Court judgment, like the judgments on the boundary adjustments on the Fort Mojave and Cocopah reservations addressed in *Arizona II*, 460 U.S. at 633, 636, 640, was a "final determination" of the title status of the disputed boundary lands, *i.e.*, upon payment of the judgment the Tribe's title was extinguished and conclusively vested in the United States. Consequently, they are not held in trust by the United States for the Tribe, but are "public domain" lands not entitled to a reserved water right under *Winters v. United States*, 207 U.S. 564 (1908), as applied in *Arizona I*.[11]

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[10] (...continued)
320 the United States contended that the "1893 Agreement was a valid and subsisting fair and conscionable agreement obtained under proper and fair means, at the behest of the Indians and for their exclusive benefit, without benefit or profit to the United States and that the United States has fully performed each and every provision of the 1893 Agreement." Defendant's Requested Findings of Fact, Objections to Petitioner's Proposed Findings of Fact, and Brief" (July 1964) at 2.

[11] Of course, nothing prevents Congress from restoring the ceded lands to the Reservation, n. 4 *supra*, which apparently was proposed, unsuccessfully, in 1971 (p. 4 *supra*). However, even if it did so, any *Winters* water right priority date would be no earlier than the date of the restoration order, which would be junior to other existing Arizona and California users. *See, e.g., Arizona II*, 460 U.S. at 641 (Cocopah Reservation expansion). See also *Arizona I*, Decree, Art. II(D), ("provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and *subject to* present perfected rights and *rights under contracts theretofore made with water users in such State* under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute"). 376 U.S. 340, 344 (emphasis added).

IV. ARGUMENT

A. Payment of the Claims Court Judgment Conclusively Extinguished the Tribe's Title to the Disputed Boundary Lands and Removed Any Legal Basis for a Reserved Water Right for Such Lands

"The 'chief' purpose of the [Indian Claims Commission Act] was to dispose of the Indian claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45 (1985). The Act conferred *exclusive* jurisdiction on the Commission to resolve Indian claims solely by the payment of compensation.[12] The Commission's "final determinations" (§19, App. 1a) were subject to review by the Court of Claims (§20, *id.*) and were to be submitted to Congress for payment (§21, App. 3a). Section 15 provided that the Attorney General was to represent the United States before the Commission and authorized him/her, "with the approval of the Commission, to compromise any claim presented to the Commission." App. 1a. Such compromises were to "be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof *in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.*" *Id.* (emphasis added).

Section 22 specified the legal effect of Congressional payment of claims pursuant to the Commission's referral, whether as a result of litigation or "compromise" (*i.e.*, settlement) (App. 3a):

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[12] *Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987); *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

> Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.
>
> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

The early cases interpreting the preclusive effect of Commission settlement judgments discussed the matter solely in terms of res judicata. *See, e.g., United States v. Southern Ute Tribe of Indians*, 423 F.2d 346, 356-57 (Ct. Cl. 1970). In 1976, the Ninth Circuit addressed the question in the context of a number of federal actions allegedly extinguishing the title to certain Indian lands and concluded that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands" pursuant to a settlement agreement under the ICC Act. *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976).

Two years later the Ninth Circuit rendered the first of three decisions involving the title to certain lands as to which the United States claimed that the Dann family of Western Shoshone Indians were in trespass, but which the Danns claimed they owned. In *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978) (*Dann I*), the court reversed a district court ruling that "collateral estoppel foreclosed the Danns from asserting that they had title to the lands because the Indian Claims Commission . . . had ruled that the lands had been acquired by the United States and that the Indians' title had been extinguished." *Id.* at 223. It held that res judicata was not applicable because the "extinguishment [of title] question was not placed in issue in the litigation before the ICC" and so was "neither actually litigated or actually decided." *Id.* at 226.

On remand, the district court concluded that the intervening affirmance of the Commission's award by the Court of Claims and its certification to Congress for payment made the award "final for purposes of res judicata and collateral estoppel" and extinguished the Dann's title "as of the date when the award was certified to the General Accounting Office." *United States v. Dann*, 706 F.2d 919, 923 (9th Cir. 1983) (*Dann II*). On appeal, the Government's argument that the court's earlier collateral estoppel decision in *Dann I* was in error was rejected on the ground that it was the "law of the case." *Id.* at 923. However, the Government's alternative argument was of special significance in light of its present arguments (*id.* at 924, emphasis added):

> The government next contends that, apart from its collateral estoppel effect, *the claims award operates by way of bar or merger to preclude the entire title claim of the Danns, under the provisions of [section 22 of]* the Indian Claims Act and the doctrine of res judicata.

The Ninth Circuit accepted the Government's "statutory preclusion" argument, but further held that it was the "exclusive" bar to further claims and that common law principles of res judicata were inapplicable. *Id.* Asserting that "Indian claims proceedings are highly extraordinary creatures of statute," it reasoned as follows (*id*):

> Congress was careful to delineate the manner in which the judgments reached in these unusual proceedings would be effectuated. We are reluctant to add to the statutory sanctions. We conclude, therefore, that the bar arising from a favorable claim determination takes effect upon the payment of the claim, pursuant to section 70u(a). We decline to find any common law res judicata bar effect arising before that time. Had Congress expected claims determinations to be governed by non-statutory principles of res judicata, it would have found no need to specify in subsection (a) that a bar arises from a favorable determination upon payment, and to specify in subsection (b) that a bar arises from a determination adverse to a claimant upon the filing of the unfavorable report with Congress.

The court disagreed with the Government's contention that the claim had been "paid" when it was certified to the General Accounting Office, thereby triggering the statutory bar. It held instead that payment had not occurred because Congress had not yet permitted a plan of distribution of the proceeds to the Tribe to become available or legislated one. *Id.* at 925-927. It also rejected the Government's contention that other alleged acts had resulted in extinguishment of title and remanded the case to the district court.

The United States petitioned for certiorari, explaining the importance of the issue involved in terms that demonstrate why its present arguments in this case must be rejected:[13]

> *Our submission in this Court rests upon a statutory rule of preclusion rather than common-law rules of res judicata or collateral estoppel.* But the policies that underlie the judge-made rules of preclusion are not inapplicable here. For over 25 years the Western Shoshone maintained the position in the claims proceedings that their aboriginal title had been extinguished. To permit that question to be reconsidered in another forum at this late date is at odds with fundamental principles of judicial economy and the disfavor with which inconsistent decisions are regarded.
>
> * * *
>
> The Court has recently reaffirmed the special rigor with which the policies of preclusion are to be applied in cases involving land title disputes. "Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open." *Arizona v. California*, No. 8 Orig. (Mar. 30, 1983), slip op. 13. Indeed, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water."

[13] Petition of the United States for a Writ of Certiorari, Docket No. 83-1486 (March 1983) at 25-26 (emphasis added).

> *Nevada v. United States*, No. 81-2245 (June 24, 1983), slip op. 17-18 n.10. The decision of the court of appeals, which gratuitously invites the wholesale litigation of subsisting Indian title to land where compensation has been awarded for extinguishment of that title, cannot be reconciled with this teaching.

This Court granted certiorari and reversed the Ninth Circuit's decision as to when "payment" under section 22 occurred, agreeing with the United States that "it occurs when funds are placed by the United States into an account in the Treasury of the United States for the Tribe." *United States v. Dann*, 470 U.S. 39, 44-45 (1985). As background for its decision it emphasized that "[t]he 'chief' purpose of the Act was to dispose of the Indian claims problem with finality." *Id.* at 45.

On remand, the Danns' attempt "to limit the effect that the claims award must be given under the Supreme Court's decision" was rejected. *United States v. Dann*, 873 F.2d 1189, 1194-95 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989) (*Dann III*) (emphasis added):

> The Danns concede, as they must, that the statutory discharge and merger provision of §22(a) of the Act . . . now applies to *all claims* touching upon the Western Shoshone aboriginal title controversy. . . .
>
> It is true that the Supreme Court's opinion was largely confined to the point that a claim that was certified, appropriated and credited to a tribal account in the Treasury was "paid" within the meaning of §22(a) of the Act, ... But the

Court's discussion did not take place in a vacuum; *it was a ruling in this very case where the issue was whether §22(a) barred the Danns' defense to the government's trespass claim.* The Supreme Court's opinion was not advisory. . . .

Now that the Supreme Court has made it clear that the Western Shoshone claim has been paid, *we cannot avoid the rule of [United States v.] Gemmill that payment for the taking of a aboriginal title establishes that that title has been extinguished.* Even without *Gemmill*, however, we would be directed by the negative implications of the Supreme Court's closing instructions in *Dann*. The Court remanded the question of individual aboriginal title in response to the Danns' argument "that because only [tribal aboriginal rights] were before the Indian Claims Commission, the 'final discharge' of §22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action." The Supreme Court's language makes little sense unless §22(a) bars a defense based on tribal aboriginal rights.

The *Dann* litigation thus established that the payment of a Commission judgment for aboriginal land claims[14] extinguishes title to the Indian lands upon which the claim is based and creates a statutory bar, independent of common law

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[14] The same rule applies to the taking of Indian reservation *trust* lands, which are involved here. *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (1981), *cert. denied*, 455 U.S. 907 (1982); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983).

rules of res judicata and collateral estoppel, to further assertion of claims against the United States based on such extinguished title. *See also*, *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958).

A few years later the statutory bar was extended to later assertion of claims against third parties. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1508 (9th Cir. 1991), *cert. denied*, 502 U.S. 956 (1992) (payment of Commission award of compensation for riverbed lands "conclusively establishes that the aboriginal title has been extinguished"and cannot form the basis for a claim against a third party for the same lands); *Western Shoshone National Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991) (extinguishment of title does not apply only to claims against the United States, but "constitute[s] a general determination of title which bars the Shoshone from asserting title against the State of Nevada"); *accord: Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992). This was a logical and inevitably necessary development in the implementation of the finality goal of the ICC Act. It would have been incongruous for Congress to establish a comprehensive claims resolution procedure (1) to resolve all past wrongs that may have been done to the Indians, including claims against the United States for failing to protect them against third party deprivations, and (2) to extinguish those claims by payments from the Treasury and, at the same time, permit them to assert those very same claims against third parties. Such a result would allow a Tribe to obtain a double recovery, first getting money from the United States and then getting the land back (including appurtenant water rights) or additional money from third parties. However, Congress intended to settle Indian claims *forever* in final judgments. It did not intend that they would rise Phoenix-like in different contexts to haunt the West.

B. The Special Master Correctly Interpreted the Unambiguous Language of the Claims Court Judgment and its Legal Effect

The Claims Court judgment provided as follows (U.S. Br. 66a-67a, emphasis added):

> Entry of this final judgment *shall finally dispose* of all rights, *claims*, or demands *which plaintiff has asserted* or could have asserted with respect to the claims in Docket 320, *and plaintiff shall be barred thereby from asserting any further* rights, *claims*, or demands against the defendant and *any future action on the claims encompassed in Docket 320*, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

The United States and the Tribe concede, as they must, that the Tribe's 1951 petition in Docket No. 320 included a clearly stated claim that the disputed boundary lands had been wrongfully taken by the United States under the 1893 Agreement. U.S. Br. 19; Tr. Br. 8-9. That claim was never withdrawn or amended, not even after the issuance of the 1978 Secretarial order which purported to void the 1893 Agreement which was the basis of the Tribe's claim and which the United States now contends made that claim "largely moot." U.S. Br. 26. It remained extant on August 9, 1983 when the Claims Court entered the settlement judgment drafted by the United

States and the Tribe providing that it "shall *finally dispose* of *all* rights, *claims*, or demands *which plaintiff has asserted* or could have asserted" and barring the Tribe "from asserting any further rights, claims or demands against the defendant and *any* future action on the *claims* encompassed in Docket No. 320." *Id.* at 66a-67a (emphasis added).

The Claims Court judgment could not be any clearer. There is no ambiguity.[15] There is no exemption or reservation of the Tribe's longstanding claim alleging the Government's "taking" of the disputed boundary lands by the 1893 Agreement.[16] *See, e.g., Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991) ("absent some express reservation hunting and fishing rights are subsumed within an unconditional transfer of title" by "full title extinguishment" under a Commission judgment).[17] Consequently, the Special

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[15] If there were any ambiguity, the Court should apply "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995).

[16] Contrast the consent judgment in *Gemmill*, p. 11 *supra* (13 Ind. Cl. Comm. 369, 386 (1964) (emphasis added):

> 4. The stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of said dockets (*expressly excluding Dockets 80-A, 80-B and 80-C*) have asserted. . . .

[17] However, it is unlikely that the Tribe would have been permitted to delete or reserve its taking claim at that late date. In *Temoak*, p. 5, n.7 *supra*, the Claims Court affirmed a Commission judgment on a claim of taking of aboriginal title after it had denied the Tribe's request to abandon part of its taking claim so that it could assert that it still possessed aboriginal title to some of the land (593 F.2d at 998):

> "We think that when the defendant announces by statute

(continued...)

Master rightly assumed "that the Fort Yuma boundary lands being claimed by the Quechan Tribe in this litigation are within the land subject to the Court of Claims case, Docket No. 320" (Mem. Opin. No. 4 at 9) and correctly held that the Tribe's pre-1893 beneficial interest in those lands was conclusively extinguished by payment of that judgment and cannot form the basis for the present claim for a reserved water right for those lands. That conclusion is supported not only by the plain language of the judgment, but by the several decisions

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[17] (...continued)
or regulation a procedure for presenting and deciding claims against it of some particular kind, and when a claimant files a petition in the manner and form prescribed, that is the procedure to be followed. The implied obligation of the claimant is to state his claim and stick to his statement, and to prosecute his claim diligently to adjudication, so that it can be paid and the government relieved of the threat of it as a thunder cloud in the sky. . . . There can be no doubt that Congress passed the [ICC Act] with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all. . . . It provided in Section 22 that payment of a claim as assessed under the Act would discharge not only the specific claim made, but all claims and demands touching any of the matters involved in the controversy. [The Congressional objectives] are frustrated by continued delay in adjudication of claims.

The court also noted that "if the Indians *desire to avert the extinguishment of their land claims by final payment*, they should go to Congress as recommended in *Western Shoshone*, 531 F.2d at 503, n.16 . . ." *Id.* at 999 (emphasis added).

It is significant that the Tribe and the United States did not call the alleged reservation of the Tribe's claim that it beneficially owned the disputed boundary lands to the attention of the Claims Court when they sought approval of the stipulated judgment in 1983. Perhaps it was because they already knew what the Claims Court's answer would likely be in light of its *Temoak* decision only four years earlier.

explicating the "statutory preclusion" effect of such judgments (pages 11, 16 *supra*) on which the Special Master relied (Mem. Opin. No. 4 at 10; Mem. Opin. No. 7 at 6):

> If the boundary lands claim of the Quechan Tribe here are lands also the subject of and part of Court Claims Docket No. 320, and I assume that this is so, the above quoted language [in the 1983 judgment] precludes the Quechan Tribe from water rights claims based on boundary lands claims in this case.
>
> * * *
>
> Therefore, it must be concluded that by virtue of the Court of Claims settlement and the money received by the Quechan Tribe as the result of that settlement, the Tribe is precluded from further boundary claims as to the Fort Yuma Reservation, and is thus precluded from asserting claims in this proceeding.
>
> * * *
>
> Docket No. 320 extinguished the Quechan Tribe claim to the land, and any claim to water rights, depending as such claim does on the ownership of the land, was also extinguished. The case of *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.); *cert. denied*, 429 U.S. 982 (1976) and *Kalispel Indian Tribe v. Pend Oreille*, 926 F.2d 1502 (9th Cir. 1991), *cert. denied*, 112 S.C. 415 (1992) support this conclusion.

Thus, it is clear that the Special Master understood both the applicable facts and applicable law, and made his decision accordingly.

C. The Special Master Properly Rejected the Extrinsic Evidence Relied on by the United States and the Tribe to Exclude the Tribe's Taking Claim for the Disputed Boundary Lands from the Claims Court Judgment

If the United States' and the Tribe's intent in settling the Docket No. 320 proceeding was as they now contend, it is simply inconceivable that it would not have been (1) reflected in a further amendment of the Tribe's 1951 petition for relief before the Commission (as had been done in 1958) to delete their takings claim following the 1978 Secretarial order, (2) explained to the Claims Court in the stipulation submitted in support of the settlement judgment, or (3) expressly addressed in the judgment they drafted by a reservation excepting the Tribe's takings claim on the contingency that the 1978 Secretarial order might be invalidated in some judicial forum (a very reasonable likelihood given the three prior Solicitors' opinions to the contrary!). None of these obvious, logical, simple steps was taken. Instead, the Court is invited to decipher the United States' and the Tribe's hidden intent and read it into the Claims Court judgment by strained inferences from several background documents. The Court should decline the invitation, as the Special Master did, because such a result would defeat the finality goals of the ICC Act and violate the parol evidence rule.

Ninety-three years ago this Court fashioned a rule governing the interpretation of agreements that purport to resolve "all claims:" "If parties intend to leave some things open and unsettled, their intent to do so should be made

manifest." *United States v. William Cramp & Sons Ship and Engine Building Co.*, 206 U.S. 118, 128 (1907). The State Parties contend that the salutary principles of the parol evidence rule preclude the use of extrinsic evidence to alter the unambiguous language of the judgment drafted by the United States and the Tribe.

This Court's decision in *United States v. Southern Ute Tribe*, 402 U.S. 159 (1971), is also instructive. That case involved a Government defense that the Tribe's claim was barred by res judicata as a result of a prior Court of Claims consent judgment which provided that it was in "full settlement and payment for the complete extinguishment of [the Tribe's] right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880." *Id.* at 160. The Government argued that the scope of the judgment should be determined solely from the face of the referenced 1880 Act, which it contended was unambiguous. The Commission, relying on extrinsic evidence, rejected the Government's res judicata defense. On appeal the Court of Claims remanded the case to the Commission "to get a better idea of exactly what the parties meant to stipulate in [the consent judgment], namely, what [land] they *then* thought was ceded by the Act of 1880." 423 F.2d 346, 357 (Ct.Cl. 1970) (emphasis in original). On remand the Commission again rejected the United States' contention that the consent judgment was self-explanatory and that the intent of the parties should be discerned solely from its language.

This Court reversed the Court of Claims interpretation of the 1880 Act to which the judgment referred (402 U.S. at 165-66):

> We disagree that the history relied on supports any of those bases for decision, even assuming (and we have serious doubts) that the plain words of the Act of 1880 can thus be varied to except the lands in suit from the phrase "any land . . . ceded" in the consent judgment.

It also "questioned the propriety" of the Court of Claims' remand to the Commission to hear additional evidence and make findings regarding "the intention of the parties to the stipulation upon which a final judgment was entered," citing *William Cramp & Sons*, *supra*, and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 140-41 (1904). *Id.* at 174, n. 9. As the *Delaware Indians* decision noted: "We can perceive no room in this case for a departure from the familiar rules of the law protecting written agreements from the uncertainties of parol testimony." 193 U.S. at 141. A similar result is required by analogy to the rule of statutory construction which precludes the use of legislative history to vary the unambiguous language of a statute. *See, e.g., Oklahoma and Texas v. New Mexico*, 501 U.S. 221, 232-33, 235, 247, *reh'g denied*, 501 U.S. 1277 (1991). Moreover, the general rule of construction favoring Indians in construing treaties and federal legislation designed to protect Indian interests is plainly inapplicable to create ambiguity where none exists,[18] particularly where, as here, the Tribe was represented by counsel, who coordinated closely with the tribal council and membership (U.S. Br. 60a-61a), and the possibility of unfair dealing was negated because of the Claims Court supervision of the proceedings.

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[18] *South Dakota v. Yankton Sioux* Tribe, 522 U.S. 344, 349 (1998); *South Carolina v. Catawba* Tribe, 476 U.S. 498, 506 (1986); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 447, *reh'g denied*, 421 U.S. 939 (1975).

D. The Special Master's Decision Was Properly Grounded on Statutory Preclusion, Not Collateral Estoppel

The United States and the Tribe erroneously analyze the legal effect of the Claims Court judgment solely in the context of common law principles of collateral estoppel. However, the preclusive effect of a judgment under the ICC Act stems from the purposes and unique procedures of that Act to bring finality to Indian claims, as this Court and the Ninth Circuit concluded in the *Dann* litigation (pages 11-16 *supra*). Although the United States, surprisingly, does not even address the "statutory preclusion" cases relied on by the Special Master (page 21 *supra*), its silence speaks volumes. It focuses instead on an intermediate state appellate court decision, *New Mexico v. Kerr-McGee*, 898 P.2d 1256 (N.M. Ct. App. 1995), citing it no less than five times. U.S. Br. 36, 38, 39, 40, 41. However, not only is its parenthetical description of the decision (*id.* at 39) not accurate, but the Commission case involved there was significantly distinguishable from the Docket No. 320 proceedings.

New Mexico involved separate claims filed with the Commission by the Laguna and Acoma Pueblos seeking compensation from the United States for (1) "permanent loss of aboriginal lands and appurtenant water rights" ("aboriginal lands"), and (2) "loss of irrigation waters appurtenant to lands *within* Pueblo boundaries ("retained lands")," but not loss of the "retained lands" themselves. *Id.* at 1258 (emphasis in original). Following the liability phase of those proceedings the Commission issued interlocutory decisions finding that the title to the Pueblos' *aboriginal* lands and appurtenant water rights had been extinguished, but that the Pueblos had failed to prove that federal action had taken or interfered with the water rights on the *retained* lands. *Id.* The Commission later struck

its findings relating to "the absence of proof of the loss of water" on the *retained* lands. *Id.* at 1262. Subsequent settlement judgments contained language "disposing of all [Pueblo] rights, claims or demands" similar to that in the Docket No. 320 judgment. 23 Ind. Cl. Comm. 219, 232 (Acoma); 24 Ind. Cl. Comm. 197, 202 (Laguna).

In a later water rights adjudication in state court, the Pueblos sought to establish their rights for irrigation water on the *retained* lands. The State of New Mexico persuaded the trial court that the comprehensive language of the settlement judgment had extinguished those water rights. The New Mexico Court of Appeals reversed. However, its decision dealt only with whether the Pueblos' water rights on the *retained* lands had been extinguished, not the water rights appurtenant to the *aboriginal* lands. As a careful reading of the *New Mexico* decision illustrates, the United States' description of it as "rejecting the argument that a compromise judgment of *land claims* under the Indian Claims Commission Act precluded the Tribe [sic] from litigating its water rights *respecting those lands*" (U.S. Br. 39, emphasis added) is plainly not correct. The court only rejected the State's argument that the claim for water rights for the *retained* lands was precluded by the settlement judgment. There was no dispute that the claim and title to the *aboriginal lands and appurtenant water rights* had been extinguished, 898 P.2d at 1262, which are the equivalent of the Quechan Tribe's claim for the disputed boundary lands and impliedly "appurtenant" *Winters* reserved water rights in their 1951 petition.

Unlike the United States, the *New Mexico* decision recognized that three different theories have historically been applied to give preclusive effect to Commission judgments — res judicata, collateral estoppel, and "general statutory preclusion derived from case law and based on the theory that

the Indian Claims Commission Act . . . was designed to resolve Indian land questions once and for all," 898 P.2d at 1259. It first held that *res judicata* did not preclude assertion of the Pueblos' water rights claims for the *retained* lands against other water users because such claims could not have been brought before the Commission, 898 P.2d at 1259-60. Next it held that those claims were not precluded by collateral estoppel because the Commission's interlocutory decisions and findings made it clear that the United States had *not* taken the water rights on the *retained* lands, *i.e.*, that the issue was not "actually and necessarily determined by the ICC." *Id.* at 1262. The court rejected the State's argument that the Commission's action should be ignored because the "settlements contradict the initial findings of the ICC to the effect that the United States was *not* liable for loss of water on the retained lands." *Id.* at 1263 (emphasis in original).

As to the "statutory preclusion"cases, it noted that they were the majority of cases "that have given preclusive effect to prior ICC proceedings" and were based on the theory "that Congress created a statutory method of preclusion for the particular subject matter." *Id.* However, it concluded that the "same rules applicable to issue preclusion analysis should apply to the statutory preclusion theory" (*id.* at 1263-64), which conflicts with the decision in *Dann II*, impliedly later sanctioned by this Court, that the Act's statutory scheme superseded the requirements of common law preclusion rules.

The critical distinction between the Laguna/Acoma Pueblos proceedings and the Tribe's Docket 320 proceedings is that the liability issues had actually been litigated and Commission decisions rendered with specific findings on the Pueblos' claims, which was not the case in Docket No. 320. Had there been a similar interlocutory decision and findings on

the Tribe's claims,[19] such formal Commission action would have to be looked to in identifying the claims that were being settled because section 20(b) of the Act provides that such findings if "supported by substantial evidence . . . shall be conclusive." App. 2a. This is *not* this case. Most important, Congress plainly intended settlement judgments to have the same preclusive effect whether or not they were preceded by earlier litigation and a Commission decision and findings. See page 10 *supra*.

The other case relied on by the United States, *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049 (8th Cir. 1990) (U.S. Br. 39), is readily disposed of. The United States accurately describes the Commission settlement judgment at issue there as "ambiguous," which a reading of the decision makes clear is an understatement. In contrast, in Docket No. 320 there is no ambiguity in the 1983 Claims Court judgment or the claims set out in the Tribe's petition, nor is there any intervening Commission decision and findings circumscribing or modifying those claims in any way.

E. The Several Documents Relied on by the United States and the Tribe Do Not Support Their Alleged Intention to Exclude the Tribe's Taking Claim from the Claims Court Judgment

Not only would it be inappropriate to use the extrinsic evidence relied on by the United States and the Tribe to alter the language of the Claims Court judgment, but the several documents they rely on do not justify the revision they seek.

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[19] Although there had been a trial on the liability issues in Docket No. 320, the proceedings were suspended and a decision and findings on liability issues were never entered (p. 4 *supra*).

Ignoring the critical documentary components of Docket No. 320, *i.e.*, the language of the settlement judgment and the Tribe's petition enumerating its claims, they focus instead on (1) the 1978 Secretarial order, (2) some irrelevant pretrial fact stipulations, (3) an Acting Deputy Assistant Secretary of the Interior's letter approving the settlement, and (4) (the Tribe but not the United States) a letter to the Tribe from its counsel explaining the proposed settlement which the Tribe approved. It is significant that the United States offered no evidence as to the motivation, understanding or intent of the Attorney General regarding the settlement, who is the only federal official authorized to settle claims under the ICC Act.

1. The 1978 Secretarial order

The United States argues that because the 1978 Secretarial order had purportedly restored the disputed boundary lands to the Tribe, the result was to "largely moot" (U.S. Br. 26) the Tribe's taking claim in its 1951 petition based on "a permanent uncompensated taking of those lands or . . . damages under a 'fair and honorable dealings' theory." *Id.* Thus, the United States contends, it would have been incongruous for the United States to have compensated the Tribe for any lands ceded by the 1893 Agreement other than those which had been excluded from the 1978 order to protect titles that had vested in third parties in the intervening 85 years. It argues that the settlement "judgment granted the Tribe monetary relief *on its outstanding claims* [and] necessarily rested on the Secretarial order." *Id.* at 30 (emphasis added). But if the $15 million settlement was not intended to include compensation for the Tribe's "outstanding claims" allegedly "mooted" because the lands had been administratively restored to the Tribe by the 1978 order, it was eminently reasonable for the Special Master to have assumed that this "extraordinarily important fact" would somehow have been called to the

attention of the Claims Court and clearly reflected in the settlement judgment (Rep. App. 2C, Mem. Opin. No. 7 at 2):

> If the Tribe, represented by the United States, was really settling only title to lands other than those covered by the 1978 Secretary's Order, this extraordinarily important fact appears nowhere in the settlement record, despite the fact that the lands covered by the 1978 Order relied upon here were central to the Court of Claims case which was being settled.[20]
>
> The plain and unambiguous effect of the settlement and Order of 1984 [sic] cannot be modified by speculation as to what the parties meant or by inferences as to their intent drawn from other documents. And if the Secretary's order of 1978 had an impact on the earlier filed and later settled Quechan Tribes' Court of Claims case, as the United States now argues, that fact nowhere appears in an unambiguous settlement agreement approved by the Court and thus made the final Order in the case. In the absence of ambiguity, the law barring parole evidence is too well settled to require citation.

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[20] The United States told the Claims Court that "the principal issue in Docket No. 320 is whether plaintiff has had title to the 25,000 acres of [disputed boundary lands] since 1894. . . ." (p. 36 *infra*). Consequently, based on that same premise, the Special Master did not "misstate" the United States' argument below when he observed that "the United States certainly did not pay $15 million to the Quechan Tribe to settle a Court of Claims case which it believes was not pending because it had been mooted by a Solicitor's ruling many years before," as the United States alleges. U.S. Br. 34-35.

The Special Master's view that the language of the settlement judgment was all encompassing also seems to be shared by the current counsel for the Tribe:[21]

> The petitions in Docket 320 asserted both taking and trespass damages. Upon trial, the Tribe could have obtained takings damages, implying that title was in the United States. Or, the Tribe could have obtained trespass damages, implying that title remained in the Tribe. . . . The settlement was not premised on one theory over the other. Nor can one conclude from the stipulated settlement that Reservation boundaries, land title and water rights were to be affected.
>
> *One obvious question is, what could the settlement have been for? This does not appear from the record in the case*. The funds paid to dismiss the claims of the Tribe against the United States in Docket 320 could have been for a number of things, including damages for trespass on Indian land, or damages due to the building of the All-American Canal (unlined canals are notoriously damaging to surrounding areas), or damages in the nature of trespass for use of tribal water, *or taking of land or water*, to name a few. In other words, it could have been for any number of things. However, the Special Master's assumption that it was for the diminishment of the Reservation or the reduc-

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[21] Tr. Br. 21 (emphasis added). The Tribe has been represented by different counsel in the Claims Court proceedings, before the Special Master, and now before this Court.

> tion of the Reservation assumes far more than is indicated anywhere on the face of the stipulation or the relevant pleadings in Docket 320.

The simple answer to the Tribe's question, in the language of the settlement judgment, is "all" of the above.

The State Parties dispute the United States' representation that "the United States clearly and consistently made those points [it now makes] before the Master," but that the Special Master nevertheless "had a flawed understanding of the Claims Court judgment." U.S. Br. 34, 35. The United States *never* explained why the language of the 1983 judgment did not reflect the alleged intent to exclude compensation for the Tribe's takings claim. Moreover, the State Parties are constrained to note that the arguments presented by the United States and the Tribe below might well have caused a less experienced judge some puzzlement, as they did the State Parties. Indeed the subtleties of the United States' argument still remain difficult to fathom even with the benefit of the Solicitor General's rehabilitative efforts.

When all is said and done, the question the Special Master asked the United States and the Tribe remains unanswered — why wasn't the alleged intention of the parties to exclude the Tribe's taking claim with respect to the disputed boundary lands because of the 1978 Secretarial order reflected in the judgment they drafted? In any event, the Special Master had a clear grasp of the settlement judgment's plain language and the Tribe's claims which it "disposed" of, as revealed in the Tribe's petition. Consequently, he properly ruled that the 1978 Secretarial order is irrelevant to interpretation of the Claims Court judgment. Rep. App. 2B, Mem. Opin. No. 5.

2. The critical impact of the *Arizona II* decision

The United States' assertion that "the [1978] Secretarial order fundamentally altered the posture of the [Claims Court] case" (U.S. Br. 25) may have been true for awhile. Of far greater and controlling significance, however, but only adverted to by the United States in passing (*id.* at 26, 28, 31), was how this Court's subsequent 1983 decision in *Arizona II* that the 1978 Secretarial order was not a "final determination" for water rights purposes until it had been subjected to judicial review dramatically changed the United States' view of the case. Although the United States repeatedly asserts that the settlement was premised on its agreement with the Tribe that the 1978 Secretarial order had restored the Tribe's title to the disputed boundary lands (U.S. Br. 30, 32, 34), that premise was abandoned after the *Arizona II* decision. Instead, both parties then recognized that the Secretarial order might be overturned in the district court litigation pending in San Diego, or elsewhere, a contingency that posed substantial risks to both the Tribe and the United States. U.S. Br. 28-29; Tr. Br. 24-25. Consequently, the scope of the proposed settlement changed significantly in that "all" of the Tribe's claims were ultimately settled without reservation of any contingent claims that might be asserted if the 1978 Secretarial order was invalidated.

The *Arizona II* decision was rendered on March 30, 1983, but the United States has presented only a truncated, incomplete discussion of what transpired in the Claims Court proceedings immediately thereafter. *Id.* at 28-30. Less than a month later, on April 20, 1983, the Tribe authorized its counsel to settle "the *claims* in Docket No. 320" for not less than $15 million. *Id.* at 50a (emphasis added). On April 28, 1983, the United States filed a "Motion to Stay Proceedings Pending Determination of Ownership" seeking to stay the damages

phase of the proceedings set to begin on June 20, 1983 "pending 'final determination' of the issue of the boundaries (and ownership) of the Fort Yuma Indian Reservation in *Metropolitan Water District v. United States*, Civ. No. 81-0678-GT(M) [then pending in the United States District Court for the Southern District of California]."[22] The United States plainly no longer assumed that the 1978 Secretarial order had *finally* resolved the title to the disputed boundary lands, a development that apparently made the Tribe's pending settlement offer unattractive.

In support of its motion the United States alleged as follows (*id.* at 4, emphasis added):

> 11. In Docket 320, the government's liability to the Quechan Tribe turns in very substantial part upon the issues of the ownership of the land in 25,000 acres and the 5,300 acres of accreted land, which were the subject of the 1978 order of the Secretary of the Interior. If that order is upheld the United States is liable for damages. *If, however, the secretary's order is determined to be invalid or legally or factually incorrect the liability of the United States would result in but a much smaller award of damages.*[23]

* * *

[22] "Renewed Motion for Reconsideration of the Quechan Tribe of Indians" (March 23, 1993) ("Ren. Mot."), Exh. 2.

[23] This was because the barren, desert land was "of limited value," as the Tribe acknowledges. Tr. Br. 25. *See also Temoak*, 593 F.2d at 996.

> 12. *It is the position of the United States that it mistakenly took the view that the ruling of the Special Master in Arizona v. California, which accepted the finality of the 1978 Order of the Secretary of the Interior, had resolved the issue of the Quechan Tribe's ownership of the Fort Yuma Indian Reservation.*
>
> 13. *Because of the reversal of the Special Master's ruling by the Supreme Court, there is no basis for the United States to agree to the tribe's ownership of the land* and thus no basis upon which the United States can continue to agree that it is liable for damages in the form of the sale and rental value of the 25,000 acres original and 5,300 acres of accreted land.

The Tribe opposed the United State's motion, arguing that the Secretary's order was final as between the United States and the Tribe and disagreeing with its assessment of the significance of *Arizona II*. Ren. Mot., Exh. 3.

The United States' reply on May 9, 1983 (Ren. Mot., Exh. 4) reiterated that its prior assumption that the 1978 Secretarial order had restored the Tribe's title to the disputed boundary lands had been "mistaken" (*id.* at 3-8, emphasis added) :

> *In light of the Arizona v. California opinion, it appears that the Government's reliance on the Secretary's 1978 order to resolve the issue of title was mistaken.* The doctrine of estoppel does not bar the Government from correcting a mistake of law.

* * *

Defendant submits that plaintiff's interpretation of the Supreme Court's ruling [in *Arizona II*] is erroneous. First, the amount of water which the Quechan Tribe is entitled to divert from the Colorado River depends on the amount of "irrigable acreage" within the reservation. The amount of "irrigable acreage" rests, in turn, on the amount of land within the Fort Yuma Reservation which the Quechan Tribe owns. *The issues of the quantum of water rights and title to land are intertwined.* . . . Accordingly, if (as plaintiff contends) the opinion in *Arizona v. California* casts doubt on the conclusiveness of the 1978 order with respect to the matter of water rights, the opinion must necessarily also cast doubt on the 1978 order with respect to the issue of title to the 25,000 acres of original land (and the 5,300 acres of accreted land).

The principal issue in Docket No. 320 is whether plaintiff has had title to the 25,000 acres of original land since 1894, not whether the 1978 Secretarial order restored title to this land. The issue of title is for the courts and the 1978 order cannot deprive the District Court for the Southern District of California of the jurisdiction to rule on validity of the order.

Plaintiff asserts that damages which may be awarded to the Quechan Tribe in Docket No. 320 will not be affected by the litigation in the *Metropolitan Water District* case. *Defendant submits that should the District Court rule that*

> *the Secretary's 1978 order was not valid, then such a ruling would have a direct and immense impact on Docket No. 320* [because] potential damages would be drastically reduced. This is because damages are premised on conveyances of this land to third parties and leases of this land by third parties between 1894 and the present.

Judge Kozinski denied the motion to stay, without opinion, on May 10, 1983, but allowed the United States "to reopen the question of its liability, preferably after the June 20, 1983, trial on damages." Ren. Mot., Exh. 5. Consequently, the parties prepared for trial in sharp disagreement over whether or not the 1978 Secretarial order had "made" the Tribe's "takings" claim in its petition "largely moot," as the United States now claims. U.S. Br. 26.

3. The May 26, 1983 pretrial stipulations

On May 25, 1983, Richard Beal, counsel for the United States, wrote counsel for the Tribe commenting on the Tribe's proposed pretrial fact stipulations with regard to the effect of the 1978 Secretarial order (Ren. Mot., Exh. 12, emphasis added):

> Enclosed are a copy of the Joint Memorandum Re: Stipulations which you furnished to me. I have made proposed changes with respect to some of the stipulations. I decline to stipulate to No. 8 and I suggest one additional stipulation. I complete the statement with respect to the 6,199 acres on the Mesa. I assume you can put all of this together in a

revised Joint Memorandum today and return it to me so it can be filed tomorrow.

1. Defendant does not stipulate to paragraph 8 and proposes a modification of paragraph 9 because the Secretary's order may be ruled incorrect, improper, and/or invalid insofar as it purports to rule that boundaries of the Fort Yuma Reservation have never changed. This is an issue that should be determined by the District Court for the Southern District of California in Docket Civ. No. 81-0678-GT(M).

The significance of the issue is substantial and one the Department of Justice cannot waive by stipulation. The issue is not whether the tribe today owns the land, but whether the land has ever been out of the tribe's ownership. *The difference is that if the land was conveyed from and by the tribe to the United States as a result of the 1893 agreement and Act of Congress, the land was conveyed in 1893 and should be valued at that time.* Here land has been valued at the time of conveyance, by patent, grant or permanent utilization for levees, canals, road etc. . . .

The following day, the Tribe and the United States filed a "Joint Memorandum re Stipulations" (U.S. Br. App. 35a) on which they principally rely to support ignoring the unambiguous language of the ultimate Claims Court judgment. U.S. Br. 27-29; Tr. Br. 12-13. Although Stipulations 4 and 5 noted the *intent* of the 1978 Secretarial order, Stipulation 8 recognized its contingent legality: "*[i]f* the December 20, 1978 secretarial order is upheld, *there are no remaining issues*

as to liability of the United States for the acquisition of portions of the Quechan Reservation" (U.S. Br. App. 37a). This stipulation seems to be in direct conflict with paragraph 15 of the stipulations, which reiterates the identical language and then notes that "The United States is unable to so stipulate because the Supreme Court opinion in *Arizona v. California* states that there must be a judicial determination of the Quechan boundary." *Id.* at 40a. The negative implications of the Tribe's proposed stipulation, *i.e.*, if the 1978 Secretarial order should be overturned there *would* be remaining liability issues, were clear to the United States, as it had explained in its rejected motion to stay the proceedings (pages 34-35 *supra*). Thus, the pretrial stipulations, both on their face and read against Mr. Beal's representations to the Claims Court in his rejected stay motion (page 35 *supra*) and his letter of May 25, 1983 (pages 37-38 *supra*), plainly conflict with the United States' assertion that:[24]

> The Master's reasoning overlooks the fact that the United States and the Tribe entered into a settlement precisely *because* they now agreed, in light of the Secretarial Order, that the Tribe owned the land in question.

On May 27, 1983, and May 31, 1983, the United States and the Tribe submitted their pretrial memoranda. Ren. Mot., Exhs. 6 and 9. On June 8, 1983, the parties appeared before Judge Kozinski for a pretrial conference. *Id.* at Exh. 13.

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[24] U.S. Br. 34 (emphasis in original). *See also id.* at 30 ("[t]he United States' payment [of $15 million] necessarily rested on the Secretarial Order, which recognized that the Tribe owned the disputed boundary lands. . . ."); *id.* at 32 ("both the United States and the Tribe agreed [that the disputed boundary lands] continued to be held by the United States in trust for the Tribe.").

Settlement possibilities were apparently discussed by the parties over the next few days (*id.* at 13-16) and the United States initially offered to settle for $13.5 million. U.S. Br. App. 46a. That offer was rejected by the Tribe, but counsel for the parties on June 15, 1983, agreed on a payment of $15 million in "settlement of the *claims* in Docket 320," which the Tribe accepted on June 16, 1983. *Id.* at 46a-47a (emphasis added). By letter of July 8, 1983, the Attorney General formally accepted the Tribe's offer to settle for $15 million, subject to certain conditions, including the following (Ren. Mot., Exh. 14):

> 4. That the judgment entered pursuant to this settlement shall finally dispose of all claims which the tribe has asserted or which the tribe could have asserted against the defendant under the Indian Claims Commission Act in Docket No. 320.

Inasmuch as Mr. Beal was Chief of the Indian Claims Section in the Department of Justice (*id.* at Exh. 12), it must be presumed that he was aware of the broad preclusive effect of judgments under the ICC Act, particularly since *Gemmill*, page 11 *supra*, had been decided in 1976, *Temoak*, page 5 *supra*, in 1979, and *Dann II*, pages 12-13 *supra*, only a few months earlier in May 1983.

Thus, whatever the intent or legal significance of the pretrial stipulations may have been on May 26, 1983, they were followed by apparently intensive settlement negotiations over a few days which ultimately resulted in the "Stipulation for Settlement and Entry of Final Judgment" filed with Judge Kozinski on August 5, 1983, based on a completely different premise as to the validity of the 1978 Secretarial order. *Id.* at 42a. Although that formal *settlement* stipulation attached four

supporting documents, it did not include or even reference the 1978 Secretarial order or the earlier *pretrial* stipulations. Consequently, there is no discernable linkage between the May *pretrial* stipulations and the August *settlement* stipulations included in the proposed settlement judgment, which were the result of subsequent negotiations. Therefore, it is not surprising that the final judgment did not refer to the *pretrial* stipulations as limiting, in any way, its preclusive effect on "*all* rights, *claims* or demands *which plaintiff has asserted* or could have asserted" by the Tribe in that proceeding. *Id.* at 66a-67a. Indeed, even if the *pretrial* stipulations had been submitted they would probably have confused Judge Kozinski, just as counsel for the United States had seemingly done in trying to explain the significance of the decision in *Arizona II* relating to the 1978 Secretarial order during the pretrial conference on June 8, 1983. Ren. Mot., Exh. 13 at 7-13.

4. The Tribe's counsel's letter of July 6, 1983

The proposed settlement required approval by the Tribe's general membership, so a general membership meeting was scheduled for July 8, 1983. On July 6, 1983, in preparation for that meeting, Mr. Raymond Simpson, the Tribe's counsel at the time, wrote to the president of the Quechan Tribal Council explaining his rationale for the settlement. Tr. Br. App. 8a. That letter (relied on by the Tribe, but not the United States) is even less supportive of the Tribe's attempt to rewrite the Claims Court judgment by unfounded inferences. Indeed it supports the State Parties' contention that the Tribe decided, after this Court's decision in *Arizona II* (in which Mr. Simpson had also represented the Tribe) and the refusal of the United States to stipulate that the 1978 Secretarial order had finally settled the title to the disputed boundary lands (pages 37-38 *supra*), that the validity of the suspect 1978 Secretarial order

might well be in jeopardy. Consequently it apparently seemed best to Mr. Simpson to obtain what he could from the United States in settlement of *all* of the Tribe's original claims, perhaps hoping that the Tribe might nevertheless be able to obtain a water rights windfall if the 1978 Secretarial order should survive the then pending challenge in the United States District Court in San Diego. Thus, he advised the Tribe as follows (Tr. Br. 12a, emphasis added):

> We were seriously concerned, also, with the consequences of the decision of the United States Supreme Court in *Arizona v. California*, where the Supreme Court refused to accept the Special Master's recommendation of additional water rights for the Quechan Tribe. The Supreme Court held that there must first be a court decision as to whether the Secretary of the Interior was correct in his 1978 order restoring the 1884 boundaries of the reservation. *The United States argued that if the boundary question were decided against the Quechans, the tribe might lose its land and, with it, most of its claimed damages.* We opposed the delay and the United States Claims Court refused to delay the trial, but *we were gravely concerned that the ultimate outcome of any court decision on boundaries might seriously jeopardize your claims case. We therefore welcomed the opportunity to settle it at this time, thereby avoiding the risks involved in any subsequent litigation over boundaries.*

The United States had helped Mr. Simpson's decision along by increasing its settlement offer from $13.5 million to $15 million. U.S. Br. 46a. This seems to have been a very

good deal for the United States as well. Although the United States now states cryptically that the Tribe's settlement proposal "resolved the United States' concern about *continuing liability* if the Secretarial order were invalidated in collateral litigation" (U.S. Br. 29, emphasis added), it does not explain how. The answer is that although pretrial stipulation No. 8 in May would have impliedly *reserved* all existing and potential claims against the United States on the contingency that the 1978 Secretarial order might be overturned (pages 38-39 *supra*), the Tribe apparently reversed field in the settlement discussions and agreed to waive *all* of its pleaded and potential claims. This would include any claims for lost *Winters* water rights impliedly appurtenant to the lands ceded under the 1893 Agreement, a claim that was not expressly included in its original or amended petition. Consequently, although the value of the disputed boundary lands in 1893 would have been minimal, the related contingent, lurking lost water rights claim against the United States, possibly a very valuable one,[25] appears to also have been waived by the Tribe in the settlement.

5. The Acting Deputy Assistant Secretary's letter of July 27, 1983

The United States and the Tribe also rely on a letter of July 27, 1983 from an Acting Deputy Assistant Secretary of the Interior - Indian Affairs (Operations) approving, as trustee for the Tribe, the proposed settlement. They contend that its statement that the "case involves claims of the Quechan Tribe *for damages for the taking of parts of their reservation after 1893* and the loss of use of other parts of the reservation from 1893 to 1978," *id.* at App. 59a (emphasis added), reflected the

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[25] An annual right to divert 71,519 acre-feet of water with a priority date of 1884 would currently be highly valuable in the lower Colorado River basin. What it would have been worth in 1893 is very speculative.

limited issues allegedly remaining before the Claims Court in 1983 as a result of the 1978 Secretarial order. U.S. Br. 30-31; Tr. Br. 13-14. But, here again, it does not say so. Indeed the emphasized portion accurately describes the Tribe's takings claim alleged in its petition for relief (pages 3-4 *supra*). Moreover, the letter is internally inconsistent. Thus, after allegedly characterizing the case as no longer encompassing the Tribe's total taking claim, it then reiterates the condition required by the Attorney General (page 40 *supra*) that "entry of judgment in this case shall finally dispose of *all claims which the tribe has asserted or which the tribe could have asserted* against the defendant under the Indian Claims Commission Act in Docket No. 320." U.S. Br. App. 60a (emphasis added).

F. The Fact That the Claims Court Judgment Was a Settlement Judgment and Contained a Disclaimer as to its Precedential Effect in Other Litigation Does Not Negate its Extinguishment of the Tribe's Title to the Disputed Boundary Lands

The United States and the Tribe further argue that, even if the Tribe's claim and title to the disputed boundary lands were extinguished as against the United States by payment of the Claims Court judgment, the Tribe somehow unexplainedly retained a beneficial interest in those lands so that both parties could later pursue claims against third parties, including the Tribe's present water rights claim against the State Parties based on alleged ownership of those lands. They contend that the Claims Court judgment can have no preclusive effect on the Tribe's claim before this Court because it contains a clause providing that it "shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." U.S. Br. 31; Tr. Br. 20. The illogic and

mischievous consequences of that argument did not escape the Special Master (Mem. Opin. No. 7 at 4, 7, emphasis added):

> In addition, the United States and the Tribe argue that whatever the effect of the final disposition of Docket No. 320, it cannot be relied on by parties not involved in that litigation since it governs only claims against the United States. The Tribe concedes that the settlement and payment of money forever bars the Quechan tribe from further claims against the United States as to this reservation land, but contends that the settlement has no preclusive effect as to third parties, unless the issue was the same in the present action, was actually litigated and is essential to a prior final judgment.
>
> This position mandates the conclusion that the United States, having acquired title to the lands in question and having settled claims against it as to the validity of that acquisition, may now, as adjudicated title holder, denigrate its title position for the benefit of the Tribe and to the detriment of others in this litigation because those others were not involved in the earlier litigation. This argument is without merit. Title to land is absolute. It is in the title holder as to the world, and cannot be asserted as to some parties and denied as to others.
>
> * * *
>
> [T]o accept the contention that a final judgment based on compromise has no real finality

> because it is not precedent in any other case *between the same parties* is to destroy the finality of judgments.

The United States' *ipse dixit* that the disclaimer language "recognized . . . that the Secretarial order would be subject to judicial challenge by third parties in other fora [and] *expressly* affirmed the parties' understanding that the judgment, based on a compromise rather than adjudication of the issues, would not affect the parties' ability to litigate related issues — such as reserved water rights — in other fora" (U.S. Br. 31, emphasis added) is a remarkably bold procrustean stretch that was not made before the Special Master and has absolutely no basis.

The disclaimer language was and is traditional boilerplate designed to protect the parties in future litigation *between themselves* and should be construed to apply only to the United States and the Tribes. It would be grossly unfair and contrary to public policy to permit the parties to a settlement agreement to bar third parties from relying on facts and legal principles apparent from the face of a final judgment. Most significantly, substantially identical language in the settlement judgments involved in the *Gemmill* and *Pend Oreille* cases on which the Special Master relied (page 21 *supra)* did not bar the utilization of those judgments in later litigation involving third parties.[26]

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[26] "5. The stipulation and judgment shall not be construed as an admission of either party as to any issue, for purposes of precedent in any other case." 12 Ind. Cl. Comm. 141, 142 (*Pend Oreille*);

"6. The stipulation of final judgment shall not be construed as an admission of any party as to any issue for purposes of precedent in any other case." 13 Ind. Cl. Comm. 369, 386 (*Gemmill*).

The United States' companion argument that a *Winters* reserved water right claim may be asserted against the State Parties because "[n]othing in the judgment purports to bar either the United States or the Tribe from asserting *different* claims against *other* parties in *other* fora" (U.S. Br. 37, emphasis in original) must be viewed as disingenuous. Although the Tribe's claim to title to the disputed boundary lands and its claim for a reserved water right for those lands may be technically "different claims," the United States well knows "that the issues of the quantum of water rights and title to land are intertwined," as it argued in its motion to stay the Claims Court proceedings (page 36 *supra*). Thus the Special Master was right on target when he concluded that "Docket No. 320 extinguished the Quechan Tribe claim to the land, and any claim to water rights, depending as such claim does on the ownership of the land, was also extinguished" (page 21 *supra).*

Finally, the United States and the Tribe err in equating the statutory preclusion principles of the ICC Act with common law principles of collateral estoppel and arguing that consent judgments, not having been litigated, are not subject to the defense of issue preclusion. U.S. Br. 38-39; Tr. Br. 17-20. Whether or not that may generally be true in the application of collateral estoppel, the courts have made no such distinction between litigated and settlement judgments under the law unique to the ICC Act, consistent with the mandate of section 15 that settlement judgments "shall be subject to the [payment bar] provisions of section 22" (page 10 *supra*). Indeed, the two leading cases relied on by the Special Master holding that such judgments extinguish any underlying Indian title claims involved settlement judgments very similar to the judgment in

Docket No. 320.[27] The Tribe's attempt to distinguish those cases on the ground that the Commission had made findings of fact and conclusions of law in each of them, whereas the Claims Court did not do so in Docket No. 320 (Tr. Br. 25, 27), should be rejected. Not only is there no such distinction in the ICC Act, but the Claims Court judgment's reference to "*all* rights, *claims*, or demands *which plaintiff has asserted*" make those claims fully ascertainable from the Tribe's petition. Moreover, where a case is finally disposed of by a settlement judgment and there is no formal Commission decision or findings to look to for further guidance, the United States,

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[27] *United States v. Gemmill*, 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976), involved a final Commission judgment based on the following"Stipulation for Compromise and Settlement and Entry of Final Judgment:"

> 4. This stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of the said dockets . . . have asserted or could have asserted against defendant in any of the said cases . . . and petitioners (and all claimants represented thereby), and each of them, shall be barred from asserting all such claims or demands in any future action.

Thompson, et al. v. United States, 13 Ind. Cl. Comm. 369, 386 (1964).

United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1507-08 (9th Cir. 1991), *cert. denied*, 502 U.S. 956 (1992), involved a final Commission judgment based on a "Stipulation to Compromise and Settle" and provided as follows:

> 3. The stipulation and entry of final judgment shall finally dispose of all claims or demands which petitioner has asserted or could have asserted in this case against defendant, and petitioner shall be barred from asserting all such claims or demands in any future actions.

The Lower Pend D'Oreille or Kalispel Tribe of Indians v. United States, 12 Ind. Cl. Comm. 141, 142 (1963); *see also Havasupai Tribe v. United States*, 752 F.Supp. 1471, 1481-82 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991).

which has defended innumerable Indian claims before the Commission and the Claims Court over the last 50 years, has a statutory and professional duty to the courts, Congress, the public, and the affected Indian tribes to clearly reveal how those claims were resolved. There is no reasonable basis to conclude that the language of the settlement judgment in this case did not do so.

V. CONCLUSION

The Special Master did not "misunderstand" the unambiguous language of the Claims Court judgment, nor "misinterpret" the United States' argument below, nor "misapply" the law of claim and issue preclusion, as the United States contends. The State Parties' contentions as to the applicability of the parol evidence rule and the rather unique "statutory preclusion" effect of payment of judgments under the Indian Claims Commission Act were not refuted by the United States and the Tribe, and he correctly applied both legal principles. Therefore, the exceptions of the United States and the Tribe should be rejected and the Special Master's recommended decision and decree approved.[28]

Respectfully submitted,

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[28] The State Parties emphasize their strong support for the Special Master's recommended approval of the proposed settlements regarding additional water rights for the Fort Mojave and Colorado River Indian reservations.

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APPENDIX

APPENDIX

Relevant Sections of the
Indian Claims Commission Act
60 Stat. 1049 (1946), codified at
25 U.S.C. §§70 *et seq.* (1976)

REPRESENTATION BY ATTORNEY

Sec. 15 . . . The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.

FINAL DETERMINATION

Sec. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

REVIEW BY COURT OF CLAIMS

Sec. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are

desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed

by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U.S.C., sec. 288), as amended.

REPORT OF COMMISSION TO CONGRESS

Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

EFFECT OF FINAL DETERMINATION OF COMMISSION

Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

FEB 18 PAGE 35

SUPREME COURT, U.S.
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No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, *et al.*

MEMORANDUM OF THE QUECHAN INDIAN TRIBE IN REPLY TO THE EXCEPTIONS OF THE STATE PARTIES

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MEMORANDUM OF THE QUECHAN INDIAN TRIBE IN REPLY TO THE EXCEPTIONS OF THE STATE PARTIES

1. INTRODUCTION.

The State Parties have objected to a portion of the Report of Special Master McGarr (dated July 28, 1999) (hereafter "McGarr Rep."). That portion rejected their contention that since no water rights claim was made for certain Quechan tribal boundary lands within the Fort Yuma Indian Reservation by the United States in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*), those claims are therefore barred by certain principles applied by this Court. *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*). For the reasons discussed below, the State Parties' exception should not be sustained.

2. BACKGROUND.

At one time, all parties here, including the State Parties, sought adjudication of the disputed boundaries of the Fort Yuma Indian Reservation. Now the State Parties seek to foreclose that possibility to gain advantage in water allocation. The key legal events in this controversy make it clear that the State Parties' exceptions are unfounded. This Court has made it clear that Article II of the original decree, involving quantification of water rights, can be modified under this Court's continuing jurisdiction. The Court has also made it clear that its 1979 supplemental decree "left open the issues about the boundaries of the other reservations." *Arizona II*, 460 U.S. at 634. This Court also ruled that the question of boundary lands on the Fort Yuma Indian

Reservation was preserved in the 1979 supplemental decree. Thus, at the risk of belaboring the somewhat complicated chronology of this case, we review the salient signposts.

1952: Arizona filed the original complaint with the Court. The United States intervened and asserted water rights for the Quechan Tribe and the Fort Yuma Indian Reservation. It did not claim water rights for certain "disputed boundary" lands based on a 1936 Interior Solicitor's opinion[1] that such lands had been conveyed away by the Tribe in an 1893 agreement.[2] Bound by the 1936 Solicitor's Opinion, the United States did not assert any claims based on the lands now in question.

1964: The Court issued a decree reserving certain boundary issues for further determination on the Fort Mojave and Colorado River Reservations. *Arizona v. California*, 376 U.S. 340, 344 (1964).

1978: On December 20, 1978, Interior Solicitor Krulitz issued an opinion[3] holding that the earlier cessions of lands by the tribes in the 1893 Agreement with the United States never became effective because conditions of that agreement had not occurred. 86 I.D. 3 (1978). That same day, the

1. Solicitors Op. M-28198 (Jan. 8, 1936); *see also Hearings on Oversight on Quechan Land Issue Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 94th Cong., 2d Sess. 69 (1976).

2. Agreement of Dec. 4, 1893 (reprinted in the Act of Aug. 15, 1894, ch. 290, 28 Stat. 286) (1893 Agreement).

3. Dept. of the Interior, Opinion of the Solicitor, No. M-36908 (Dec. 20, 1978), 86 Interior Dec. 3 (1978).

Secretary of the Interior issued an order revising the boundaries of the Fort Yuma Indian Reservation to recognize the holding of the Krulitz opinion. *Arizona v. California*, 460 U.S. at 632-633; *see also Quechan Indian Reservation Boundaries*, 46 Fed. Reg. 11372 (1981).

1978: On December 22, 1978, the United States moved in this case to modify the 1964 decree to obtain water rights for certain tribal "boundary" lands and "omitted" lands. The United States noted that final boundary determinations had been mentioned by this Court specifically only for the Colorado River and Fort Mojave Reservations. However, it argued that the fundamental equitable principles involved should require that the same rules apply to other reservations whose boundaries have finally been determined to include land not known to be encompassed in 1964. The State Parties essentially agreed with the United States' view, responding that there had been no final determination of any of the various boundary disputes and asking the Court to address them. *See* Exception by State Parties to Report of Special Master and Supporting Brief at 20, *Arizona v. California*, No. 8, Original (Dec. 20, 1999) (hereafter State Parties' Excp.).

1979: On January 9, 1979, the Court held that quantities of water in the original decree would continue to be subject to appropriate adjustment by agreement or decree of the Court "in the event that the boundaries of the respective Reservations are finally determined." *Arizona v. California*, 439 U.S. 419, 421 (1979) (supplemental decree).

1982: On February 22, 1982, Special Master Elbert T. Tuttle issued a final report that concluded that the 1978 Solicitor's Opinion concerning Quechan lands was a final

determination. Special Master Tuttle determined that additional water was due to the Quechan Tribe because of this additional land within the Fort Yuma Indian Reservation.

1983: This Court rejected Special Master Tuttle's view of the secretarial order. The Court ruled that the 1979 supplemental decree did not resolve the boundary disputes but left open the relevant articles of the original decree concerning quantities of water, not only for the Colorado River and Fort Mojave Reservations but also as to "issues about the boundaries of the other reservations." *Arizona II*, 460 U.S. at 634. The Court noted that "if at all possible, the boundary disputes would be settled in other forums." *Id.* at 638. A case concerning these matters had been filed in 1981 but was ultimately dismissed for lack of jurisdiction. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987).

1984: A supplemental decree by the Court specifically revised Article II(D)(5) to provide that quantities for the Fort Yuma and other Indian reservations would be subject to appropriate adjustments by decree of the Court "in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California*, 466 U.S. 144, 145 (1984).

1987: The Ninth Circuit Court of Appeals dismissed the case brought by Metropolitan Water District to determine boundary lands on the grounds of lack of jurisdiction. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987). This Court affirmed the Ninth Circuit on a split vote. *California v. United States*, 490 U.S. 920 (1989).

1989: On July 19, 1989, the State Parties moved to reopen the decree to determine the disputed boundaries on the Fort Yuma Indian Reservation and others.

3. ARGUMENT

3.1 The Status of The Quechan Tribe's Lands Has Never Been Litigated. The Court's "Omitted" Lands Decision Does Not Apply.

The State Parties first argue that the determination of boundaries of the Fort Yuma Indian Reservation is bound by this Court's "strong interest in finality." State Parties' Excp. at 19 (citing *Arizona II*, 460 U.S. at 620, dealing with the so-called "omitted lands."). They further argue that the United States "could have" raised boundary land claims on behalf of the Quechan Tribe at earlier stages of this litigation. *Id.* at 20. They also contend that representation made by the United States concerning the limits of its claims regarding "omitted lands" should also be "read as a limitation on its claims as to the boundaries of each reservation." *Id.* These views are legally incorrect.

This case does not involve "omitted" lands. The historical background and procedural context of the so-called "omitted lands" issue in *Arizona II* is markedly different from the background and context of the issue of the disputed boundary lands involved here. Footnote 14 in *Arizona II* is critically important to an understanding of the Court's rejection of the United States' and the Tribes claim for omitted lands. The United States had earlier, as indicated in footnote 14, acknowledged to Special Master Rifkin that there were additional lands *within reservations* for which the United States was not seeking a water allocation and would not offer proof of irrigable acreage:

> Master Rifkin then inquired: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?" Mr. Warner replied: "That is correct," and Master Rifkin noted: "that is the way we are going to be bound. This is a statement that I will take seriously."

Arizona II, 460 U.S. at 622 n.14 (quoting Tr. of Arg. before Special Master Rifkin, 14, 154-14, 157). Thus, finality principles were applied to a later claim of "omitted" irrigable acreage where counsel for the United States had previously made known to the Court that he was aware of lands *within reservations* for which they would choose not make a claim for water allocation. *Arizona II*, 460 U.S. at 628. This present case, however, involves no such "known but omitted" lands. Rather, it deals with lands that were presumed, at the time the United States made the statements noted above, to be outside the Reservation and thus not within the subject matter of the case.

Rather than foreclose adjudication of all relevant claims, Article IX of the 1964 Decree provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Arizona v. California, 376 U.S. 340, 353 (1964). Article IX was included in the recommended decree as an agreed-upon

provision. *Arizona II*, 460 U.S. at 622 (citing Rifkin Rep. at 360). In Article IX, the Court retained the "power to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the decree." *Id.* at 618. Thus, the State Parties' views on finality do not coincide with the rulings in this case. The Court has made it clear that it has retained jurisdiction to consider modification of the decree or any supplemental decree. *Arizona II*, 460 U.S. at 618.

Because of the unique nature of this original jurisdiction case, Article IX alters application of res judicata and other finality principles. When the United States and the tribes claimed that practicably irrigable acreage located within reservation boundaries was omitted from the calculations of Special Master Simon Rifkin, this Court stated that there was no question "that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata." *Arizona II*, 460 U.S. at 617. However, in the context of this proceeding the Court disagreed with the Special Master concerning application of law of the case, stating:

> To extrapolate wholesale law of the case into the situation of our original jurisdiction, *where jurisdiction to accommodate changed circumstances is often retained*, would weaken to an intolerable extent the finality of our decrees in original actions, particularly a case such as this turning on statutory rather than Court-fashioned equitable criteria.

Arizona II, 460 U.S. at 619 (emphasis added; footnote omitted).

After reviewing certain fundamental principles of finality, the Court concluded that Article IX did not "contemplate a departure from these fundamental principles so as to permit retrial of factual or legal issues that were *fully and fairly litigated 20 years ago*." *Arizona II*, 460 U.S. at 621 (emphasis added). Accordingly, the Court expressly held, that while Article IX is subject to the general principles of finality and repose, this is so only in the absence of changed circumstances or unforseen issues not previously litigated. *Id.* at 619. The obvious point here is that the boundary of the Fort Yuma Indian Reservation has never been litigated at all.

The Court specifically preserved this issue in a proviso in the 1979 supplemental decree, which states as follows:

> [P]rovided that the quantities fixed in paragraphs (1) through (5) of Art. II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment *by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.*

Arizona v. California, 439 U.S. 419, 421 (emphasis added).

The Court's subsequent opinions confirm this reading. In another proviso in the Court's decree of April 16, 1984, the Court again reserved the disputed boundary land question:

> [P]rovided that the quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1, 2, 3, and 4 [the other four reservations] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Arizona v. California, 466 U.S. 144, 145 (1984).

As we have discussed above, this Court's decision in *Arizona II* rejects the "omitted lands" claims on finality principles. This rejection rests on a fundamentally different ground than does the United States' and Tribe's request for seeking additional water allocation for the disputed boundary lands. The *Arizona II* decision on the "omitted lands" in no way puts the Tribe and the United States on notice as to the possible application of those principles with respect to the disputed boundary lands claim.[4]

Further, it is difficult to understand how the United States could have raised the disputed boundary claims in its request to the Court in 1964, since the official position of the United States Government at the time was that there was no dispute. Their position in 1964 was based on the 1936 Solicitor's Opinion, which concluded that the lands in question were not within the boundaries of the Fort Yuma Indian Reservation. The United States was bound to take a litigation position legally consistent with its internal determinations. The Special Master noted that the United States necessarily

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4. The third argument made by the State Parties, that the tribes or the United States have not made any expenditures for irrigation facilities on the disputed boundary lands in anticipation of a successful outcome, State Parties' Excp. at 26, is simply specious in light of the years of uncertainty surrounding the status of the disputed boundary lands. As this Court has noted, water allocation to the tribes have been "limited to the irrigable lands within the reservation boundaries as the Master had determined them to be." *Arizona II*, 460 U.S. at 637.

relied on the 1936 Solicitor's Opinion as the basis for determining which lands were within the boundaries of the Fort Yuma Reservation. Order No. 4 at 6 (Sept. 6, 1991). Indeed, the Special Master points out that the United States "had no other option." *Id.*

In 1974, after extensive analysis and consultation, Solicitor Krulitz reversed the 1936 Opinion and concluded that the conditions in the 1893 Agreement had never been satisfied and thus the boundary lands had not been ceded and remained within the Reservation. Just as Solicitor Margold's 1936 opinion was binding on the Department of the Interior at the time, so is Solicitor Krulitz's opinion today. The Special Master correctly understood that this change in the legal status of the 1893 Agreement by the Interior Department is more than a change of legal theory by the Justice Department. *Cf.* State Parties' Excp. at 26. And, it is fundamentally different than a new claim for irrigable lands, which were always known to have been within the Reservation boundaries, and for which the claim was arguably relinquished on the record. Neither the United States nor the Quechan Tribe ever relinquished claims to the boundary lands.

3.2 The State Parties' Preclusion Argument Is Untimely And Is Waived.

The State Parties admit openly that they did not "raise a preclusion defense in their opposition to the United States' and the Tribes' 1978 motion to open the 1964 Decree." State Parties' Excp. at 25. Given the State Parties' failure to raise the res judicata defense in *Arizona II*, their eleventh-hour assertion of it before Special Master McGarr renders it untimely.

Moreover, the State Parties have waived the ability to raise this defense. The State Parties seek to excuse their failure to timely raise their res judicata arguments with the assertion that this Court "could have" raised the preclusion defense sua sponte in response to the Tribe's 1978 motion to open the 1964 Decree.[5] *Cf.* State Parties' Excp. at 25. Whatever this Court "could have" done does not excuse the State Parties' failure in fact to make this argument.

Cases cited in support of the State Parties' nonwaiver argument acknowledge a split in the circuits on whether a res judicata argument can be made long after the litigation is underway. The State Parties cite a concurring opinion in *Nixon v. United States*, 978 F.2d 1269, 1297 (D.C. Cir. 1992) (cited in State Parties' Excp. at 25). But *Nixon* was not resolved by application of res judicata, and the concurring justice simply notes the split in the circuits regarding an appellate court's ability to raise res judicata sua sponte. The question of whether the court could do so in the situation before it was an open question. *Id.* at 1297 (Henderson, J., concurring).

Nor does the State Parties' citation of *Armstrong v. Norwest Bank*, 964 F.2d 797 (8th Cir. 1992), assist them. *Armstrong* was an action in bankruptcy. The Eighth Circuit held that Armstrong, the trustee for the bankruptcy estate of Trout, was bound by stipulations that Trout had entered into

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5. The State Parties argue that, in determining waiver, the "decisive" factors should be (1) whether the United States and the Tribe had a full and fair opportunity to litigate the preclusion issue before Special Master McGarr, and (2) whether the State Parties' failure to raise the defense of res judicata in *Arizona II* somehow prejudiced the Tribe. State Parties' Excp. at 25. This is not the standard.

with a creditor and upon which the court had held hearings. *See id.* at 800-01. The Eighth Circuit held that the doctrine of res judicata bars only the trustee's claims that were raised after a subsequent decision of the bankruptcy court. *Id.* at 802.

The State Parties also cite the Court's decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (holding that Congress' statutory direction to reopen final judgment in a whole class of cases violates separation of powers doctrine). There has been no congressional directive to open final decisions here. Indeed, there is no serious contention that the Quechan boundary lands question has *ever* been finally adjudicated. *See Arizona v. California*, 466 U.S. 144, 145 (1984) (quoted in State Parties' Excp. at 24). *Plaut* is inapposite.

It does not assist the State Parties that the Court could have raised the defense sua sponte. Indeed, the State Parties' argument concerning the Court's ability to raise spontaneously the preclusion defense cuts against them. If a court may raise res judicata sua sponte where it regards "the desirability of avoiding duplicative litigation is sufficiently compelling," *id.* at 25 (quoting *Lesher v. Lavrich*, 784 F.2d 193, 195 (6th Cir. 1986)), the fact that the Court did not do so here is also compelling, particularly since, there is *no* duplicative litigation here.

Attempts to actually litigate the Fort Yuma Reservation boundaries have been unsuccessful. Although this Court spoke approvingly of a suit filed in the district court to fully litigate the boundary issues, that action was ultimately dismissed on jurisdictional grounds. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987). The

decision was affirmed by an equally divided court. *California v. United States*, 490 U.S. 920 (1989). Thus, the underlying rationale of a preclusion defense, such as that raised by the State Parties here, is missing.

By citing *Lesher*, the State Parties continue to ignore that there has been no adjudication of the disputed boundary lands, and that the State Parties themselves had sought adjudication of the issue. *E.g., Arizona II*, 460 U.S. at 637 ("Indeed, all of the parties treated the boundary matters as fully adjudicable issues of material fact or law."); *see also id.* at 638. The basis for refusal to find a waiver is predicated on the need to avoid duplicative litigation. In *Lesher*, the preclusion of the federal claim was based on the parties having litigated the constitutional issue to the state supreme court. *See generally Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986). Here there has been no litigated determination of the boundary issue.

As noted above, the State Parties admit that they did not timely raise a preclusion defense in 1978. State Parties' Excp. at 25. Indeed, in 1982 the State Parties argued that Special Master Tuttle erred by *not* adjudicating the boundary issues. *Arizona II*, 460 U.S. at 638. Now they argue it would be error *to* adjudicate those issues. The State Parties, and this Court, have long been aware of the 1978 Solicitor's Opinion; indeed, the opinion was the basis for the United States' 1978 motion to open the 1964 Decree. The State Parties have waived any right to raise this defense now.

3.3 The Solicitor's Opinion Affirming Quechan Ownership of Disputed Lands Is a Changed Circumstance Negating a Preclusion Defense.

Lastly, the State Parties complain that the Special Master wrongly barred their preclusion defense by treating the 1978 Krulitz Opinion as a "new fact" or "unknown circumstance" barring use of res judicata to defeat the Tribe's claim. State Parties' Excp. at 26. In Order No. 4 (Sept. 6, 1991), the Special Master rejected this argument, finding that the 1978 opinion *was* a changed circumstance that bars application of preclusion principles.[6] Order No. 4 at 6-7.

The State Parties argue that the 1978 Solicitor's Opinion, which included the contested lands within the Reservation boundary, was not an "unknown circumstance" that arose after the United States made claims for the Quechan Tribe. State Parties' Excp. at 26-27. They do not explain how the Justice Department, presenting claims on behalf of Quechan in 1964, could have known about a Solicitor's opinion that would not be issued until 14 years later.

The law recognizes that in certain circumstances judicial decisions rendered subsequent to the prior litigation may constitute such changed circumstances as to prevent an estoppel. *E.g., Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). The Special Master correctly concluded that the 1978 Solicitor's Opinion was such a changed

6. We note that, with respect to the Special Master's conclusion that the 1983 settlement bars the Quechan Tribe from seeking an additional allocation of water for the disputed lands is generally governed by principles of collateral estoppel. With respect to whether the 1964 Decree bars the claim, the more appropriate set of preclusion principles are those relating to res judicata.

circumstance and that the Quechan Tribe was not precluded from asserting water rights based on the disputed boundary lands claims here, even though the United States initially did not include those claims in 1964. Order No. 4. at 6-7. Further, as the Special Master notes, the Justice Department had no choice but to conform its position with the Solicitor's conclusions. *Id.* at 6.

The State Parties' sole contention with respect to the Special Master's characterization of the 1978 Solicitor's Opinion as an unforeseeable unknown circumstance is that "it is hornbook law that a different legal theory with the same factual basis will usually be barred." State Parties' Excp. at 27. This statement ignores the character of the 1978 Solicitor's Opinion and its effect on the Justice Department. The determination of which lands lie within the Fort Yuma Indian Reservation is fundamentally different from deciding which Reservation lands the United States would put forward proof of "practicably irrigable acreage." *See Arizona II*, 460 U.S. at 622 n.14. As the Special Master noted, the 1978 Solicitor's Opinion is a binding, official construction of the 1893 Agreement and the facts surrounding whether the conditions of that agreement were met. Not in existence in 1964, the 1978 Solicitor's Opinion correctly served as an independent basis for the United States' motion to reopen the decree in 1978. The United States did not have the option in 1964 (nor now) of taking a litigation position contrary to that of the Solicitor. *See* Order No. 4 at 6.

Thus, the 1978 Solicitor's Opinion is correctly considered an unforeseen circumstance barring application of res judicata. *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (3d ed.) at § 131.22. Simply alleging new facts in support of claims asserted in a prior

action will usually not avoid application of res judicata but, "if such facts *in themselves* establish independent grounds for a claim against the defendants in the previous action, claim preclusion does not apply, even if the new claims are based on the same legal theories or seek the same damages as the prior action." MOORE'S FEDERAL PRACTICE, § 131.21(1) (emphasis in original). Such is the case here.

The State Parties are not prejudiced in any way by this construction because the 1964 and 1979 decrees anticipate judicial resolution of the disputed boundary lands. Indeed, the State Parties themselves sought this resolution in the *Metropolitan Water District* litigation. *See generally Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub nom. California v. United States*, 490 U.S. 920 (1989). Adjudicated and final resolution of this long-standing issue is all the Tribe seeks here.

4. CONCLUSION.

The Court refused to rule on the nature, extent, and irrigability of the Quechan disputed boundary lands in *Arizona II* because it set aside Special Master Tuttle's findings that the 1978 secretarial order constituted a final determination of the status of the boundary lands. That status remains undetermined after years of litigation. The State Parties now contend that, because the United States did not initially seek an allocation of water for the disputed boundary lands, the Tribe's current claim should be barred, just as the United States' deliberate decision on the record to not seek an allocation based on practicably irrigable acreage acknowledged to be *within* the Reservation boundaries barred a subsequent claim based on that acreage. The Special Master correctly rejected this contention, and this Court should do so as well.

The just and only practical way to resolve the long-standing uncertainty concerning the Quechan boundary lands is to remand the matter to the Special Master for adjudication on the merits of the Quechan Tribe's claim to the disputed lands and a corrected water allocation to serve the practicably irrigable acreage within those lands.

Respectfully submitted,

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